(26,215)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 748.

PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES H. MINDS, SURVIVING AND LIQUIDATING PARTNER OF JAMES H. MINDS AND WILLIAM J. MATZ, LATELY TRADING AS BULAH COAL COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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DOCKET ENTRIES

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 2422. December Sess., 1912.

J. A. Gleason John H. Minds H. W. Moore G. M. Roads	James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, *Petitioner,* *vs.*
Francis I. Gowen John G. Johnson	Pennsylvania Railroad Company.

PETITION TO ENFORCE ORDER OF INTERSTATE COMMERCE COMMISSION.

1913	February	7	Petition filed. Order on defendant to plead, answer or demur within 30 days filed.
"	"	10	Proof of service of copy of petition and order to plead, &c., filed.
"	March	4	Demurrer filed.
"	July	21	Order overruling demurrer with leave to defendant to file a plea filed.

"	August	20	Order for the appearance of John G. Johnson, Esquire, for defendant filed.
			Plea filed.
1915	October	8	Order to place case on Trial List filed.
"	November	9	Jury called.
"	"	10	Trial continued.
"	"	11	Juror withdrawn and cause continued.
1916	April	5	Petition to amend original petition filed.
"	"	8	Answer of Pennsylvania Railroad Company to petition for leave to amend original petition filed.
"	"	10	Order, Dickinson, J., granting leave to plaintiff to amend petition filed.
"	"	14	Defendant's pleas to amended petition filed.
"	October	7	Subpoena to Michael Trump returned "served" and filed.
"	"	9	Jury called (see minutes).
"	"	10	Trial continued.
"	"	11	Trial continued.
"	"	12	Verdict for plaintiff for Sixteen thousand ninety-two and 92-100 ($16,092.92) Dollars.
"	"	16	Defendant's motion and reasons for a new trial filed.
"	November	1	Argued sur motion for new trial.
"	"	6	Opinion, Dickinson, J., discharging rule for new trial filed.
"	"	8	Supplemental Opinion sur motion for new trial filed.
"	"	10	Bill of Exceptions filed.
			Order sealing bill of exceptions filed.
			Praecipe for judgment filed. Judgment accordingly.

Opinion, Dickinson, J., allowing counsel fee of $3250.00 filed.

" " 14 Petition and order allowing writ of error filed.

Bond sur writ of error approved and filed.

Assignments of error filed.

Writ of error allowed and issued and copy thereof lodged in Clerk's office for adverse party.

Citation allowed and issued.

Citation returned service accepted and filed.

Praecipe sur transcript of record filed.

UNITED STATES OF AMERICA, ss.

THE PRESIDENT OF THE UNITED STATES,

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania,

Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, plaintiff, and Pennsylvania Railroad Company, defendant, a manifest error hath happened, to the great damage of the said Pennsylvania Railroad Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do com-

mand you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States at Philadelphia, the 14th
(Seal) day of November, in the year of our Lord one thousand nine hundred and sixteen.

GEORGE BRODBECK,
Deputy Clerk of the District Court of the United States.

Before DICKINSON, *J.*

Allowed—

BY THE COURT.

Attest—

GEORGE BRODBECK,
Deputy Clerk.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 2422.

JAMES H. MINDS, surviving and liquidating partner of JAMES H. MINDS and WILLIAM J. MATZ, lately trading as BULAH COAL COMPANY,
Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

PETITION.
Filed Feby. 7, 1913.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

Your petitioner, James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, having his principal place of business at Ramey, in Bigler Township, Clearfield County, and State of Pennsylvania, and who is a citizen and resident of Clearfield County, in the said State of Pennsylvania, humbly complaining shows your Honors:

I. Your petitioner is lawfully and rightfully entitled to receive and does hereby claim from the defendant above named the sum of Thirty-one thousand seven hundred fifteen dollars and fifty-seven cents ($31,715.57), with legal interest thereon from June 28, 1907, to June 1, 1912, amounting to Nine thousand three hundred seventy-eight dollars and seventy-two cents ($9,378.72), being the sum of Forty-one thousand ninety-

four dollars and twenty-nine cents ($41,094.29) with legal interest thereon from June 1, 1912, as and for damages and reparation in accordance with a report and order of the Interstate Commerce Commission, dated March 11, 1912, a copy whereof is hereto attached, marked "Exhibit A" and prayed to be made and read as part hereof, and in accordance with the several Acts of Congress in such case made and provided; and the defendant justly and legally owes to petitioner the sum above set forth, together with legal interest thereon from June 1, 1912, and a reasonable attorney's fee to be taxed as part of the costs against defendant.

II. The defendant prior to any and all dates mentioned was and now is a corporation incorporated under the laws of the State of Pennsylvania and a common carrier, engaged in interstate commerce by transportation of passengers and property by continuous carriage by railroad over their own lines and as connecting carriers from points of origin in Pennsylvania to points outside of Pennsylvania throughout the United States and to Canada and Mexico, and has its principal operating office in Philadelphia, Pennsylvania, in the Eastern District of Pennsylvania, through which said City and in which Eastern District of Pennsylvania the line of said defendant runs and is operated.

III. During the period from the twenty-fifth day of June, 1902, to October 1, 1904, the petitioner was lessee of valuable seams and veins of bituminous coal underlying lands situate in Bigler Township, Clearfield County, Pennsylvania, and operated thereon a fully equipped colliery known as Webster No. 4, which colliery was adjacent to the tracks of the Moshannon Branch of the Tyrone and Clearfield Railway, one of the main branches of defendant's line and operated by defendant as its Tyrone Division, and during said period, petitioner was continuously engaged in mining

coal at said mines and selling it to points outside of the State of Pennsylvania, and maintained at said colliery a full mining equipment and a sufficient force of employees. During the same period the daily capacity of said Webster No. 4 mine was five hundred and sixty (560) tons per working day, which quantity petitioner was always able and prepared during said period to mine, ship and sell, had he been supplied by the defendant with sufficient cars to transport the same, but defendant did not furnish petitioner with sufficient cars to transport his coal as aforesaid, nor did it furnish to petitioner his proper pro rata of the cars upon defendant's line, but in its distribution of railroad cars to mines along its line, the defendant unjustly discriminated against petitioner's mine, Webster No. 4, and gave undue and unreasonable preference and advantage to mines operated by the Berwind-White Coal Mining Company, and other shippers on the Tyrone Division, particularly to shippers whose mines were situated upon the Moshannon Branch of the Tyrone Division in close proximity to Webster No. 4, and having, in common with it, their sole outlet to market by way of defendants' lines, whereby defendant violated its duty as a common carrier and petitioner was put to great and unjust disadvantage and was unable to ship coal to market which he was able to mine, and for the sale of which he had orders for delivery to points outside of the State of Pennsylvania, and because of defendant's refusal to adequately supply petitioner's need for cars and because of such unjust di[illegible]mination against petitioner in the daily car distribu[illegible]n of cars upon defendant's line, and in particular upon the Tyrone Division, petitioner was damaged and suffered loss as producer, shipper and seller of coal in the interstate coal trade and was deprived of profits which he would otherwise have made upon coal which he was unable to ship and sell, and for which he was unable to accept contracts, although such contracts were avail-

able, by reason of defendant's undue and wrongful discrimination and refusal to properly supply him with cars as aforesaid.

IV. The mines owned, operated and controlled by the Berwind-White Coal Mining Company, and other favored companies, as aforesaid, are situated upon the Moshannon Branch of the Tyrone and Clearfield Railway, on the Tyrone Division of said defendant in close proximity to the Webster No. 4 mine owned by petitioner, and have a common outlet with petitioner's said mine to reach the markets for bituminous coal, either within or without the State of Pennsylvania, over the lines of the defendant company, and there are no circumstances or conditions of carriage as against petitioner's mine, Webster No. 4 aforesaid.

Between June 25, 1902, and October 1, 1904, petitioner made daily requests and gave daily orders for coal cars to be delivered to his said mine, to be loaded with coal for transportation to points and places beyond the State of Pennsylvania, but was denied and refused cars and was unduly and unreasonably discriminated against by defendant in the distribution of coal cars, whereby petitioner was at different times and for varying periods of time compelled to close his operation and hold his mine idle, whereby his miners and laborers removed, his organization and plant became demoralized and disorganized, and whereby petitioner was prevented from filling valuable contracts, or from accepting and securing other valuable contracts, to his great damage as herein set forth.

During the period from June 25, 1902, to October 1, 1904, the defendant arbitrarily assigned and furnished to the favored mines aforesaid in the Tyrone Division, not less than 105,521 "assigned" (arbitrary) cars, which said cars were assigned as "individual" and "foreign" cars, and were not charged against the *pro rata* share of said favored mines in making up the distribution sheets for said division, and did not enter

into the distribution of the coal cars among the mines of said division, whereby said favored companies were given the cars aforesaid over and above and in addition to their fair *pro rata* of cars in the division, and were illegally and wrongfully preferred in car distribution as aforesaid in said division. And during the same period petitioner's mine, Webster No. 4, received only a few arbitrary cars, and they were charged against said mine's distributive share in the ratings for the division.

During the same period defendant unduly and unjustly discriminated against the Clearfield Division in which petitioner's said mine was located, by arbitrary award of not less than 640 coal cars per day to other divisions, for the use of favored mines in said divisions, over and above the proper proportion to which said divisions were properly entitled, to the prejudice of non-favored mines in the Clearfield Division, and in particular of your petitioner's mine, Webster No. 4.

V. Your petitioner, on the 28th day of June, 1907, duly filed with the Interstate Commerce Commission a complaint setting forth the unjust, unreasonable and discriminatory practice of defendant to the prejudice of petitioner and in violation of the Act to Regulate Commerce, approved February 4, 1887, and Acts amendatory thereof or supplemental thereto, and praying that a hearing be had upon the allegations set forth in said complaint, and that the Commission make an order awarding complainant therein reparation and damages to such amount as it might be ascertained that said complainant had suffered.

Defendant, being duly served with a copy of said complaint, made answer thereto, issue was joined, and the cause regularly heard and argued by all the parties thereto, and submitted, and resulted in a finding duly filed and reported by the Interstate Commerce Commission at a general session at its offices in Wash-

ington, D. C., on Docket No. 1136, Opinion No. 1455, dated December 5, 1910, a copy of which finding, with the conclusions and orders of the Commission, is hereto attached and marked "Exhibit B" and made a part of this petition.

VI. After the filing of briefs by all parties and oral argument had at a general session of the Commission, and the submission of findings of fact and of law on the part of the complainant and of defendant, upon the question of reparation alone, there resulted a further finding regularly and properly made by the Commission on March 11, 1912, ordering the defendant to make reparation to petitioner as in paragraph one of this petition above set forth, and as fully appears in the copy of the report, conclusions and order of the Interstate Commerce Commission in Opinion No. 1833, Docket No. 1136, dated March 11, 1912, a certified copy whereof is hereto attached, marked "Exhibit A" and made a part of this petition.

VII. Petitioner avers that a true copy of the aforesaid orders of the Interstate Commerce Commission, dated December 5, 1910, Opinion No. 1455, Docket No. 1136, and March 11, 1912, Opinion No. 1833, Docket No. 1136, were duly served upon defendant in the above entitled cause and demand made that defendant pay petitioner the sum claimed in this petition and as set forth in the aforesaid order of the Commission dated March 11, 1912, "Exhibit C", hereto attached, but that defendant has wholly failed, neglected and refused to pay the said sum or any part thereof, and that no such sum nor any part thereof has been paid by defendant or any one on its behalf to petitioner or any one in his behalf. Wherefore petitioner has instituted this proceeding to enforce the aforesaid order regularly and lawfully made under the Act to Regulate Commerce, approved February 4, 1887, and the acts amendatory thereof or supplemental thereto.

Wherefore the said James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as the Bulah Coal Company, as aforesaid, respectfully prays:

First—That your Honorable Court enter a rule and order upon the said defendant, the Pennsylvania Railroad Company, to file a plea, answer or demurrer to this petition within thirty days from date of service of a copy of the same upon said defendant.

Second—That your Honorable Court will, by its order, fix a time and place for the trial of this cause, under the provisions of the Act to Regulate Commerce aforesaid.

Third—That your Honorable Court will hear, determine and adjudicate the matter involved in this cause hereinabove recited and the exhibits hereto attached.

Fourth—That your Honorable Court will enter judgment in favor of petitioner and against the said defendant, the Pennsylvania Railroad Company for the sum of Forty-one thousand ninety-four dollars and twenty-nine cents ($41,094.29), as hereinbefore set forth, with legal interest thereon from June 1, 1912, and costs, including a reasonable attorney's fee.

Fifth—That your Honorable Court may take such other order or orders in the premises as the necessity of the case may require or as to your Honorable Court may seem meet.

And your petitioner, as in duty bound, will ever pray, etc.

JAS. H. MINDS.

STATE OF PENNSYLVANIA, *ss.*

James H. Minds, one of the above named petitioners, being duly sworn according to law, doth depose and say that the facts contained in the foregoing petition are true, to the best of his knowledge and belief.

JAS. H. MINDS.

Sworn and subscribed to before me
this 31st day of January, 1913.

JOHN B. McGRATH,
(Seal) *Notary Public.*
My commission expires February 27, 1913.

INTERSTATE COMMERCE COMMISSION
Washington

I, JOHN H. MARBLE, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached are true copies of the Report and Order of the Commission entered March 11, 1912, in cases No. 1136, James H. Minds and Julia A. Matz, trading as The Bulah Coal Company against Pennsylvania Railroad Company, and No. 1137, James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as The Bulah Coal Company against Pennsylvania Railroad Company, the originals of which are now on file and of record in the office of this Commission.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and affixed the seal
(Seal) of the Commission, this 18th day of January, 1913.

JOHN H. MARBLE,
Secretary of the Interstate Commerce Commission.

Opinion No. 1833.

INTERSTATE COMMERCE COMMISSION.

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

PENNSYLVANIA RAILROAD COMPANY.

No. 1139.

W. F. JACOBY and ISAAC C. WEBER, trading as W. F. JACOBY & COMPANY,

v.

SAME.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

SAME.

No. 1136.

JAMES H. MINDS and JULIA A. MATZ, trading as the BULAH COAL COMPANY,

v.

SAME.

No. 1137.

JAMES H. MINDS, surviving and liquidating partner of JAMES H. MINDS and WILLIAM J. MATZ, lately trading as the BULAH COAL COMPANY,

v.

SAME.

Submitted April 20, 1911. *Decided March* 11, 1912.

Reparation awarded for damages resulting from discriminations practiced by the defendant in distribution of coal cars.

David L. Krebs, Harry White, and *A. M. Liveright* for Hillsdale Coal & Coke Company and Clark Brothers Coal Mining Company.

William A. Glasgow, Jr., and *John H. Hall* for W. F. Jacoby & Company.

H. W. Moore, George M. Roads, John H. Minds, William H. Patterson and *James H. Gleason* for Bulah Coal Company.

George V. Massey, Francis I. Gowen, and *Murray & O'Laughlin* for defendant.

SUPPLEMENTAL REPORT OF THE COMMISSION.

HARLAN, *Commissioner*:

In *Joynes v. P. R. R. Co.*, 17 I. C. C., 361, it was alleged that the defendant had given a preferred use of its terminal facilities in Pittsburgh to certain shippers of fruits and vegetables, in consequence of which the complainant had sustained loss by reason of the decay of certain of his shipments due to the delay in setting his cars at the unloading platform. We declined to make an award, three Commissioners dissenting, on the ground that this Commission was not authorized under the act to award damages of that character. The general principle announced was that money demands of that nature, arising out of discriminations ascertained and found by the Commission to have been practiced by an interstate carrier, are cognizable only in the courts and that our jurisdiction extends to what is there referred to as rate damages as distinguished from general damages of the kind demanded.

These complaints, in which the same defendant was charged with discrimination in the distribution of its coal-car equipment and in which general damages are alleged to have been sustained by the petitioners by reason of its unlawful practices in that regard, were then pending before the Commission. While they were still under consideration and after our conclusions in *Joynes v. P. R. R. Co., supra,* had been announced,

the Circuit Court of the United States for the Eastern District of Pennsylvania, in *Morrisdale Coal Co. v. P. R. R. Co.*, 176 Fed., 748, dismissed an action for damages alleged to have been sustained by reason of the same rules and regulations of the Pennsylvania Railroad respecting the distribution of its coal cars as are involved in the cases now before us. The claim was based on discrimination, and the authority of the Court had been invoked not only to determine that discrimination had been practiced by the defendant against the plaintiff but also to ascertain and enter judgment for the damages so sustained. The Court held that this Commission alone could entertain a complaint of that nature. See also *Morrisdale Coal Co. v. P. R. R. Co.*, 183 Fed., 929.

It will be seen therefore that with respect to the principle announced in *Joynes v. P. R. R. Co., supra,* there is a conflict of view as between the Commission and the very court to which these complainants, if refused any relief here, would doubtless have to resort to secure a judgment for the damages here claimed to have been sustained. In order, therefore, to prevent a failure of justice in these cases, as well as to create an opportunity to secure a final ruling by the courts as to what should be our course of action in the future in such cases, we concluded to proceed with these claims; and having found that undue discriminations had been practiced by the defendant against the complainants, we ordered a reargument on the question of the amount of damages respectively sustained by them by reason thereof.

The history of the complaints, the issues raised by the pleadings, and our course in dealing with them, are fully explained in our previous reports herein. *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 19 I. C. C., 356; *Jacoby & Co. v. P. R. R. Co.*, 19 I. C. C., 392; and *Bulah Coal Co. v. P. R. R. Co.*, 20 I. C. C., 52. And therefore, in proceeding for the reasons explained to

exercise jurisdiction to award damages, no statement of the facts need be made. It will suffice to refer to our reports in the cases cited. The record has now been carefully studied with a view to arriving at the amount of damages which each of the complainants is shown to have sustained, and we shall briefly announce our conclusions:

Claim of the Hillsdale Company.

We find that as a result of the discriminatory acts of the defendant the Hillsdale Coal & Coke Company was damaged in the sum of $27,193.01, which it is entitled to recover, with interest from May 9, 1907.

The original claim was for $127,855.65, which upon reargument was restated at $108,207.05, based on the assumption of a full car supply. A more conservative claim of $65,434.87 was also made in the brief on reargument, based on an assumed output of 600 tons per day and what is claimed would have been a fair distribution of cars to this division of the defendant's lines and a fair share to these mines. Giving full weight to all that we find of record, however, we have been unable to find any clear basis for awarding this sum. Nor is there sufficient proof to enable us in this claim to make any finding with respect to the damages alleged to have been sustained by reason of the excess cost of mining the coal actually shipped to interstate destinations resulting from the irregular and inefficient working of the mine due to the failure of the defendant to furnish a regular and adequate supply of cars.

In arriving at our conclusion we have divided the time into two periods, the first from October 1, 1903, to March 31, 1906, after which the mines in this district were closed down for several months as the result of a strike; and the second from August 1, 1906, to May 1, 1907. We find the following facts established by the complainant's proof, and have used them as factors in calculating the damages:

(*a*) That the complainant's mines, known as Hills-

dale Nos. 2 and 3, during each of the two periods could have produced and disposed of an average of 500 tons of coal per working day; and that 22 working days would have been an average working month.

(*b*) That if the complainant had received its proper proportion of the cars available for distribution by the defendant it could have shipped and disposed of 143,880 tons during the first period and 67,795.20 during the second period; that it actually shipped during the two periods 45,059.84 tons and 35,719.25 tons, respectively, making a shortage in its output of 98,820.16 tons during the first period and 32,075.95 during the latter period; that of this tonnage 87,831.36 tons would have moved to points without the State of Pennsylvania during the earlier period and 15,662.68 during the latter period. In other words, we find that the quantity of coal which the complainant was prevented from selling and shipping to interstate destinations as the result of the discrimination against it in the matter of car supply was 87,831.36 tons and 15,662.68 tons for the periods named.

(*c*) That the average selling price for the coal at the mine for interstate markets would have been $1.0711 per ton during the first period and $1.1320 during the second period; that the cost of production during the same periods with its proper proportion of cars would have been 81 cents and 86 cents per ton, respectively; and that the profit lost on the shipments and sales which the complainant was prevented by the discriminatory acts in question from making during the first period was 26.11 cents per ton and during the second period 27.2 cents.

We have attached no importance to the fact, but for a better understanding of the situation it may be well to state, that this complainant has recovered of the defendant a judgment in the sum of $17,500 in an action in the state courts similar to this proceeding, but relating only to intrastate traffic. *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 229 Pa., 61; 78 Atl., 28.

CLAIM OF JACOBY & COMPANY.

We find that by reason of the discriminations ascertained and set forth in our report in *Jacoby v. P. R. R. Co.*, 19 I. C. C., 392, the complainants were damaged to the extent of $21,094.39, which they are entitled to recover with interest from June 28, 1907.

The claimants here demand $51,950.49. The award above made we base upon evidence adduced of record from which we find:

(*a*) That the fair rating of the mine for the time in question, as fixed by the defendant and not objected to by the complainants, was 450 tons per day.

(*b*) That during the period from April, 1904, to March 31, 1905, the mine was operated 275 days; and that during the second period named on the exhibits, from April 1 to October 18, 1905, it was operated 138¼ days.

(*c*) That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods.

(*d*) That the average selling price of the complainants' product for the first period was $1.212 per ton, and in the second period $1.1670; that the cost of production, based on economical operation of the mine with a fair car supply, would have been 92 cents during the entire period of the action; and that the profit during the first period would therefore have been 29.2 cents and during the second period 24.7 cents per ton. This measures the loss on the tonnage which the complainant was unable to ship.

(*e*) That the actual cost of production is shown by the record as $1.016 per ton during the first period and $1.049 per ton during the second period, making

an excess of 9.6 cents and 12.9 cents for the respective periods in the actual cost of production under the conditions obtaining, as compared with what would have been the cost based on a fair car supply as heretofore stated. This is the basis adopted for computing the loss sustained by these complainants in diminished profits on the coal actually shipped during the period in question.

We further find that the complainants in the sale of their mine realized a profit of $7,500 over the purchase price which they had paid. But we do not undertake to say whether or not this amount or any part of it should be deducted from the amount of reparation here awarded.

Claim of Clark Brothers Company.

The discrimination practiced by the defendant against Clark Brothers Coal Mining Company is set forth in *Jacoby v. P. R. R. Co.*, 19 I. C. C., 392. We now find that the damages sustained by this claimant as the result thereof amounted to $31,127.96, and that it is entitled to an award of reparation in that sum, with interest from June 25, 1907.

The amount of its claim as stated in the original petition was $36,401.12. Our findings of fact, on which we arrive at this conclusion, are as follows:

(*a*) That the mines known as Falcon Nos. 2, 3 and 4 had an average output capacity of 600 tons, 120 tons and 275 tons per working day, respectively, for the period of the action; and that 20 working days would have been an average working month.

(*b*) That dividing the time in question into two periods, one prior to March 31, 1906, and the other from August 1, 1906, to May 1, 1907, as we have done in the *Hillsdale case, supra,* the complainant could have disposed of and shipped 38,537.40 tons from Falcon No. 2 during the first period and 74,498.40 tons during the second period; that it actually shipped from that

mine 11,812.76 tons and 21,326.18 tons in the respective periods, making a shortage in the output of 26,724.64 tons during the first period and 53,172.22 tons during the second period; and that of this tonnage it would have shipped and sold at interstate destinations 19,086.73 tons during the first period, and 35,109.61 tons during the second period.

(*c*) That from Falcon No. 3 the complainant could have shipped and sold 7,707.48 tons during the first period and 14,899.68 during the second period, if it had received its proper share of equipment; that it actually shipped from this mine during those periods 1,184.66 tons and 3,018.90 tons, respectively, making its output 6,522.82 tons during the first period and 11,880.78 during the second period less than it would have been with the proper car supply; and that of the figures last mentioned it would have shipped to points without the state of Pennsylvania 3,866.72 tons and 6,423.93 tons in the respective periods.

(*d*) That with its proper proportion of cars the mine known as Falcon No. 4 could have produced, sold and shipped during the first period 12,210 tons and during the second period 34,145.10 tons, whereas it actually was able to ship but 2,306.12 tons and 11,105.45 tons; that it therefore shipped 9,903.88 tons during the first period and during the second period 23,039.65 tons less than it would have sold and shipped with its proper proportion of the cars; and that of this shortage 9,184.85 tons represents what would have been interstate business during the first period, and 8,497.02 tons during the second period.

(*e*) That the average selling price of the coal mined at Falcon No. 2 during the first period was $1.289 per ton and during the second period $1.25 per ton; that the cost of production at that mine, based on a fair car supply, would have been 92 cents per ton and 96 cents per ton during the respective periods; that the average selling price of the coal from Falcon No. 3

was $1.20 during both periods and the cost of production 92 cents and 96 cents during the two periods; that the average selling price at Falcon No. 4 was $1.07 per ton during the first period and $1.132 per ton during the second period, and that the cost of production at that mine was 82 cents per ton and 86 cents per ton during the respective periods. The profit that would have accrued on the output of the respective mines was therefore as follows: Falcon No. 2, 36.9 cents and 29 cents; Falcon No. 3, 28 cents and 24 cents; and Falcon No. 4, 25 cents and 27.2 cents per ton. This measures the loss on the tonnage which the complainants were unable to ship.

(*f*) That the actual cost of production is shown by the record as $1.1419 per ton during the first period and $1.2063 per ton during the second period at Falcon No. 2; that the actual cost at Falcon No. 3 was $1.166 per ton during the first period and $1.311 per ton during the second period; that the actual cost at Falcon No. 4 was $1.017 and 90 cents during the respective periods; and that the excess over the cost of production, as shown in the preceding paragraph herein, resulting from the irregular car supply, was 22.19 and 24.63 cents per ton, respectively, at Falcon No. 2; 24.6 and 35.1 at Falcon No. 3; and 19.7 and 4 cents for the respective periods at Falcon No. 4. This is the measure we have used in arriving at the loss sustained by these complainants in increased cost of producing the coal actually sold and shipped to interstate points during the period in question.

Claim of Bulah Coal Company.

Following our conclusion in *Bulah Coal Co. v. P. R. R. Co.*, 20 I. C. C., 52, that the defendant had unlawfully discriminated against these complainants, we now assess the damages resulting therefrom at $50,307.05, with interest from June 28, 1907.

The reparation prayed for by the complainants aggregates $155,401.59. In our previous report we took April 12, 1904, as the date for dividing the period of the action. Upon further reflection October 1, 1904, seems more proper, that being the date of the formation of the new co-partnership. In arriving at the foregoing amount of reparation we have therefore considered the matter in two periods, one prior and the other subsequent to that date, and make the following findings:

(*a*) That the fair rating of the mine, fixed by the defendant without objection by the complainants, was 560 tons during both of the periods referred to.

(*b*) That 22 working days would in this case have been an average working month, although it is alleged that the mine could have been worked 26 days per month.

(*c*) That if the complainants had received their proper proportion of the cars available for distribution they could have mined, sold, and shipped 120,415.68 tons during the first period and 214,257.12 tons during the second period; that they actually shipped during the two periods 110,892 and 143,000 tons, respectively, making a shortage in their output of 9,523.68 tons in the first period and 71,257.12 tons for the second period; and that of this tonnage 3,878.04 tons during the first period and 48,540.34 tons during the second period would have moved to and have been sold at interstate destinations.

(*d*) That the average profit on orders received by the complainants for points without the State of Pennsylvania, and which were canceled and unfilled as the result of lack of their fair proportion of available equipment, would have been 71.8 cents per ton during the first period and 25.2 cents per ton during the latter period. This measures the complainants' loss on the coal which they were unable to ship during the period of the action, and the damages allowed on this ground aggregate $15,016.60.

(*e*) That the cost of production at the complainants' mine during the first period was $1.23 per ton on the average, and during the second period $1.08; that the cost of production would have been 88 cents per ton during both periods if a nondiscriminatory share of the car supply had been received; and that the excess in the actual cost of production of the coal mined and shipped to interstate destinations resulting from the discrimination in car supply was therefore 35 cents per ton during the first period and 20 cents during the second period. This is the measure of the complainants' damages in the excess cost of production on the coal actually sold and shipped to points outside the State of Pennsylvania during the period of the action; and the damages awarded on that ground aggregates $35,290.45.

In cases of this kind there is a natural tendency on one side to enlarge and on the other to minimize the claim made. This is characteristic of the record before us. Damages are claimed by the petitioners to an extent not supported by the evidence adduced; on the other hand, the defendant has not sought so much to help the Commission to arrive at a correct award as to show the fallacious character of the factors adopted by the complainants in arriving at their estimates of their damages. The result is a record that is not so helpful as it might be. The responsibility for this, however, rests with the parties; in such a case we can accept only the responsibility that follows upon a careful study of the record and an earnest effort to weigh all the evidence before us and to reach such conclusions as it fairly justifies.

Many theories as to the elements that should be considered in estimating damages in a case of this kind were advanced by each side. It is said by the complainants that their damages should be estimated on the basis of a supply of coal cars according to the physical capacity of their mines, or at least on the

basis of their rated capacity. We have dealt with the claims only on the basis of the fair proportion of the available equipment that each claimant was entitled to receive in view of what we here find would have been a proper rating for each operation. According to the argument and brief on behalf of the defendant there is no sound theory upon which the damages of the complainants may be calculated. The defendant contends in all these cases that the coal which the complainants were unable to mine because of their failure to obtain their fair share of cars still remained in the ground, and that the extent of the damage really suffered can not therefore be ascertained without proof, showing that the coal when subsequently mined was sold at a less profit than might have been realized during the period of the action. We are not prepared to enter upon a discussion of that question. Such claims are clearly justiciable, and we know of no better guide or basis for our action than the rule followed by the courts in similar cases. In the action by the Hillsdale Coal & Coke Company in the state courts, to which reference has heretofore been made, the Supreme Court of Pennsylvania, in 229 Pa., 261; 78 Atl., 28, said:

> "As we look at it, the only known method to get at data from which to estimate what a man is damaged by reason of discrimination, in not furnishing cars or other facilities of transportation, is to give the shipper discriminated against what would have been a reasonably fair profit on whatever is shown to be the fairly probable output of the mine discriminated against, less what was actually shipped from that mine. * * * Counsel for appellant argued that because, as a result of the defendant's discrimination, the coal of the plaintiff was left in the ground, and might be available for future shipment, and as there was no evidence that prices which prevailed throughout the period of the action were abnormal, or in

excess of those reasonably ruling, there was no room for the inference that the plaintiff would realize for his coal when it might be shipped in the future less than it would have realized if shipped during the period of the action. But the burden was upon the defendant to show anything of this kind, by way of mitigation of damages, if it could do so, and it offered no evidence for any such purpose."

We do not undertake to say whether this is a correct rule, but simply refer to the case in explanation of our findings.

Orders will be entered in accordance with these conclusions.

SUPPLEMENTAL ORDERS.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 11th day of March, A. D. 1912.

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C., 356, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant

be, and it is hereby authorized and directed to pay unto complainant, Hillsdale Coal & Coke Company, on or before the 1st day of June, 1912, the sum of $27,193.01, with interest thereon at the rate of 6 per cent. per annum from May 9, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1139.

W. F. JACOBY and ISAAC C. WEBER, Trading as W. F. JACOBY & COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C., 392, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendants be, and it is hereby authorized and directed to pay unto complainant, W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Company, on or before the 1st day of June, 1912, the sum of $21,094.39, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C., 392, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainant, Clark Brothers Coal Mining Company, on or before the 1st day of June, 1912, the sum of $31,-127.96, with interest thereon at the rate of 6 per cent. per annum from June 25, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1136.

JAMES H. MINDS and JULIA A. MATZ, Trading as THE BULAH COAL COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Com-

mission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of December 5, 1910, 20 I. C. C., 52, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainants, James H. Minds and Julia A. Matz, trading as The Bulah Coal Company, on or before the 1st day of June, 1912, the sum of $31,715.57, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1137.

JAMES H. MINDS, Surviving and Liquidating Partner of JAMES H. MINDS and WILLIAM J. MATZ, Lately Trading as THE BULAH COAL COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of December 5, 1910, 20 I. C. C., 52, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainant, Jams H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as The Bulah Coal Company, on or before the first day of June, 1912, the sum of $18,591.48, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

By the Commission.

JOHN H. MARBLE,
(Seal) *Secretary.*

INTERSTATE COMMERCE COMMISSION,
Washington.

I, JOHN H. MARBLE, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached are true copies of the Report and Order of the Commission entered December 5, 1910, in cases No. 1136, James H. Minds and Julia A. Matz, trading as the Bulah Coal Company, against Pennsylvania Railroad Company, and No. 1137, James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as The Bulah Coal Company, against Pennsylvania Railroad Company, the originals of which are now on file and of record in the office of this Commission.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name, and affixed the seal
(Seal) of the Commission, this 18th day of January, 1913.

JOHN H. MARBLE,
Secretary of the Interstate Commerce Commission.

Opinion No. 1455.

Before the
INTERSTATE COMMERCE COMMISSION.

No. 1136.

JAMES H. MINDS and JULIA A. MATZ, Trading as THE BULAH COAL COMPANY,

v.

PENNSYLVANIA RAILROAD COMPANY.

No. 1137.

JAMES H. MINDS, Surviving and Liquidating Partner of JAMES H. MINDS and WILLIAM J. MATZ, Lately Trading as THE BULAH COAL COMPANY,

v.

SAME.

REPORT AND ORDER OF THE COMMISSION.

Submitted February 1, 1909. *Decided December* 5, 1910.

Upon complaint that the defendant's system of rating mines and distributing its coal-car equipment is discriminatory, it is so found, and *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 19 I. C. C. Rep., 356, and the other cases in that group of cases, are cited and reaffirmed. The question of damages is reserved for further argument.

H. W. Moore, George M. Roads, John H. Minds, William H. Patterson, David L. Krebs and *James H. Gleason* for complainants.

Francis I. Gowen, George V. Massey and *Murray & O'Laughlin* for defendant.

REPORT OF THE COMMISSION.

HARLAN, *Commissioner*:

On or about April 12, 1904, a member of the copartnership that filed the first of these two complaints died, and his place in the firm was taken by his widow. This change in interest is the explanation of the two complaints; the first one prays for damages in the sum of $80,174.60, alleged to have been sustained prior to that date, and the second demands an award in the sum of $75,226.99 for damages alleged to have been suffered after that date. The claims in each case are based upon the allegation that the defendant was guilty of unjust discriminations against the complainants in the distribution of its coal-car equipment during the period covered by the complaints and also failed to furnish the complainants with an adequate supply of cars. We are also asked to require the defendant hereafter to furnish the complainants, in the daily distribution, with their just proportion of its available coal-car equipment, that proportion to be ascertained by the physical output capacity of the mines served by the defendant, without regard to their so-called commercial capacity.

This question in all of its aspects was fully considered in *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 19 I. C. C. Rep., 356; *Jacoby & Co. v. P. R. R. Co.*, 19 I. C. C. Rep., 386; and the other cases there referred to and which were disposed of at the same time. It will not be necessary therefore again to consider it here. It will suffice to say that we find upon this record that the defendant, during the period covered by these actions, was guilty of an undue and unjust discrimination against the complainants, by reason of the enforcement of the rules then in effect for the distribution of its available coal cars among the mining operations that it served; and an order in that regard will be entered herein substantially similar to the orders entered in the cases above mentioned. As those

orders require the defendant to put in effect for the future a non-discriminatory system of car distribution no further order in that regard need be entered here.

In addition to the damages alleged to have been suffered by the complainants by reason of the defendant's rules of distribution, there are one or two other matters that must be mentioned. The mine of these complainants, known as Webster No. 4, is in the vicinity of the operations involved in *Jacoby & Co. v. P. R. R. Co., supra,* and is connected by a switch track with the defendant's Moshannon branch. It produces a superior quality of soft coal that is used for steaming and forging purposes and also as a domestic coal; it is in good demand and brings a high price in the markets of consumption. The tipple, mining machinery, and the general development of the mine were designed for a shipping capacity of from 1,000 to 1,200 tons of coal per working day. Its capacity, as rated by the defendant in 1906, was 16 thirty-five ton cars per day, or 560 tons, indicating a maximum monthly output of 14,000 tons. At the same time the defendant rated Eureka Mine No. 7, about half a mile distant on the same mineral and surface estates and belonging to the Berwynd-White Coal Mining Company, at 14 cars per day. Although defendant gave the two mines about the same rated capacity, the latter mine seems to have received not only a more substantial and regular supply, but a larger number of cars each month. On that point the defense interposed is that the petitioners received their fair proportion of the entire number of cars distributed on the Tyrone division, and therefore have no ground for complaint. A similar defense was made in *Hillsdale Coal & Coke Co. v. P. R. R. Co., supra,* but we there held that under the law a shipper has the right not only to receive its fair and full proportion and use of a carrier's equipment and facilities, but may protest against the giving to a competitor of a supply of cars in excess of his fair and just propor-

tion. We repeat that principle here. It is one of great importance in coal-mining operations, as all will agree who have looked into such matters. One of the evils lying at the root of the trouble is that the mine that has a larger and more constant supply of cars may not only be operated at less cost, but, what is equally if not more important, such a mine is able to attract miners from the other mines because of the assurance it gives of a more constant opportunity to earn a daily wage.

The greater regularity of the car supply made available to the Berwynd-White Coal Mining Company operations, as is pointed out in *Jacoby & Co. v. P. R. R. Co., supra,* is partly explained by the fact that that company not only owned a large supply of private cars, but had railway-fuel contracts which, under the rules for distribution then in effect, resulted in giving it a large and regular number of assigned cars. This discrimination, as was pointed out in the cases referred to, resulted from the rules then in effect and need not be further considered here. In this connection it may be well to say that the complainants predicate a part of their damages upon the fact that in 1902 the defendant sold 1,000 of its system coal cars to the Berwind-White Coal Mining Company, 500 to the Keystone Coal & Coke Company, and 700 to the Ellsworth Coal Company. The defendant meets this claim by asserting that if these cars had been retained as system cars they would have added to the car supply of the complainants during the time in question only a fraction of a car per day. We have not verified this assertion, but any damage resulting from the sale by the defendant of a portion of its own equipment to other coal companies is substantially covered by our finding that the proper practice in the distribution of all available cars was to count all assigned cars against the equipment of the mine receiving them.

The complainants characterize as a special dis-

crimination against their mine the fact, as is alleged, that they repeatedly had great difficulty in getting the trainmen and agents of the defendants to place on their siding and at their tipple the cars that had been assigned for delivery to them. It is said that the cars were frequently left at the foot of the siding and that the complainants had to pull them into place with mules. It is also said that the cars were frequently delivered so late in the morning as not to leave them available during that day, and that cars delivered late in the day were not infrequently charged against that day's quota of cars and against the quota of the following day as well. On these matters, however, we do not find a sufficient basis in the record for affirmative conclusions or anything to indicate that the complainants, in those respects, were put by the defendants on any less favorable basis than their competitors.

Another fact which is made a ground for a claim of damages is that in 1903 the complainants asked the privilege of purchasing certain cars for use in transporting coal from their mine, but were informed by the defendant that they were discouraging the use of new individual car contracts. Later the complainants negotiated for the purchase of 100 wooden gondola cars, which at that time were in actual use in the transportation of coal by another mining company over the lines of the defendant; but the defendant declined to permit their use by the complainant on the ground that the cars were not up to standard. The negotiations were therefore not carried to a conclusion, but apparently the cars were still in use, when these complaints were filed, for the transportation of coal by the defendant for other shippers. Later there was some controversy with respect to the use of 25 new steel cars purchased by the complainants for their own use, but which were kept temporarily out of service, pending some dispute between the complainants and the de-

fendant with respect to the terms of the contract covering their use as private cars.

While there are also other things shown of record which put the defendant on explanation and properly subject it to just criticism, the only point upon which the record affords a sufficient basis for affirmative findings grows out of the rules and system then in effect for the distribution of available equipment among the various coal mining operations. We have condemned that system in the cases heretofore alluded to and found it to be unduly and unjustly discriminatory, and we have so found here. But as was the case with those proceedings we desire further light on the amount of the damages thus sustained. The latter question will therefore be set for further argument at the time when the same question is argued in the group of cases heretofore mentioned. The special reasons for entering upon the consideration of the question of damages in these cases have been explained in *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 19 I. C. C. Rep., 356.

An order will be entered in accordance with these conclusions.

PROUTY, *Commissioner*, dissenting: Without restating my views in this proceeding, I desire it to be understood that my dissent in the case last cited is equally applicable here. In that dissent Commissioner Clements joined. It is the desire also of Commissioner Lane to be understood as entertaining in this proceeding the same views respecting the lawful basis for rating mines for the distribution of coal cars that are expressed in his dissenting opinion in the case last mentioned.

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 5th day of December, A. D. 1910.

Present:

MARTIN A. KNAPP,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
FRANCIS M. COCKRELL,
FRANKLIN K. LANE,
EDGAR E. CLARK,
JAMES S. HARLAN,
} Commissioners.

No. 1136.

JAMES H. MINDS and JULIA A. MATZ, Trading as THE BULAH COAL COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

No. 1137.

JAMES H. MINDS, Surviving and Liquidating Partner of JAMES H. MINDS and WILLIAM J. MATZ, Lately Trading as THE BULAH COAL COMPANY,

v.

SAME.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof; and it appearing that it has been the defendant's rule, regulation, and practice, in distributing coal cars among the various coal oper-

ators on its lines for interstate shipments during percentage periods, to deduct the capacity in tons of foreign railway fuel cars, private cars, and system fuel cars, in the record herein referred to as "assigned cars," from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all "unassigned" cars:

It is ordered, That the said rule, regulation, and practice of the defendant in that behalf unduly discriminates against the complainants herein and is in violation of the third section of the act to regulate commerce.

It is further ordered, That the question of the damages claimed by the complainants in these proceedings in respect of the matters and things in said report found to be discriminatory be deferred pending further argument in the premises.

To the Pennsylvania Railroad Company, Defendant in above case:

Attached hereto will be found a true copy of the order made by the Interstate Commerce Commission, dated March 11, 1912, Opinion No. 1833, Docket No. 1136, awarding to the complainant the sum of Thirty-one Thousand seven hundred fifteen dollars and fifty-seven cents ($31,715.57), with legal interest thereon from June 28, 1907, to June 1, 1912, as and for damages and reparations and in accordance with the report and order of the Interstate Commerce Commission.

Demand for payment thereof is now formally made on behalf of the complainant and unless payment of this award is received by February 5, 1913, a petition will be filed in the United States Court for the purpose of enforcing the order and award aforesaid.

H. W. Moore,
Attorney for Petitioner.

ORDER OF COURT.
Filed Feby. 7, 1913.

And now, February 7th, 1913, the petition of James H. Minds, complainant in the above proceedings having been filed and the averments thereof considered, it is ordered that the Pennsylvania Railroad Company, defendant, be and is directed and ruled to file a plea, answer or demurrer to said petition within thirty days of the service of a copy of said petition, together with a copy of this order or judgment *sec. leg.*

J. W. THOMPSON, *J.*

DEMURRER OF DEFENDANT TO PETITION OF THE PETITIONER.
Filed March 4, 1913.

The Pennsylvania Railroad Company, the defendant in the above-entitled action, by protestation, not confessing or acknowledging all or any of the matters or things in the said petition contained to be true in such manner and form as the same are therein set forth and alleged, demurs to the said petition, and for causes of demurrer shows:

1. That it appears from the petition itself that the petitioner is not entitled to maintain the action.

2. That it appears from the petition that the action or proceeding has been brought to recover the amount of a certain award made in favor of the petitioner and against the defendant by the Interstate Commerce Commission, which said award the said Commission was without authority to make, because the authority conferred by the Acts of Congress creating the said Commission and defining its powers and jurisdiction does not extend to nor include the making of awards of the character of that which forms the

basis of the present action, nor has the said Commission been empowered by said Acts of Congress to entertain claims for damages of the character asserted by the petitioner in the proceeding instituted by it before the Commission which eventuated in the making of the said award.

Wherefore, and for divers other good causes of demurrer appearing on the said petition, this defendant doth demur thereto. And it prays the judgment of this Honorable Court, whether it shall be compelled to make any answer to the said petition; and it humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

JOHN G. JOHNSON,
Solicitor and Counsel for Defendant,
The Pennsylvania Railroad Company.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

JOHN G. JOHNSON,
Of Counsel for Defendant, The Pennsylvania Railroad Company.

Philadelphia, March 1, 1913.

STATE OF PENNSYLVANIA,
CITY AND COUNTY OF PHILADELPHIA, } *ss.*

Lewis Neilson, being duly sworn, deposes and says: I am Secretary of the Pennsylvania Railroad Company, the above-named defendant. The foregoing demurrer is not interposed for delay.

LEWIS NEILSON.

Sworn to before me this 28th day of February, 1913.

HENRY E. CAIN,
(Seal) *Notary Public.*
Commission expires February 21, 1915.

ORDER OF COURT.
Filed July 21, 1913.

And now, to wit, this 21st day of July, 1913, it is ordered that the Demurrer in the above entitled cause be overruled with leave to plead, etc.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

PLEA.
Filed Aug. 20, 1913.

Defendant in the above pleads "Not Guilty."
August 20th, 1913.

JOHN G. JOHNSON,
Attorney for said Defendant.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

December Term, 1912. No. 2422.

JAMES H. MINDS, surviving and liquidating partner of JAMES H. MINDS and WILLIAM J. MATZ, lately trading as BULAH COAL COMPANY,

vs.

PENNSYLVANIA RAILROAD COMPANY.

December Term, 1912. No. 2424.

JAMES H. MINDS and JULIA A. MATZ, trading as BULAH COAL COMPANY,

vs.

PENNSYLVANIA RAILROAD COMPANY.

PETITION TO AMEND ORIGINAL PETITION.

To the Honorable, the Judges of the said Court:

The undersigned petitioners respectfully represent:

1. That the above cases were originally begun before the Interstate Commerce Commission, the division into two actions having been made necessary by the death of William J. Matz, one of the partners of the original firm, on April 12, 1904. The petition for the first period was brought by James H. Minds, surviving and liquidating partner of James H. Minds, and William J. Matz, lately trading as Bulah Coal Company; and the petition for the seond period was brought by James H. Minds and Julia A. Matz, trading as Bulah Coal Company.

2. When the petitions were filed with the Inter-

state Commerce Commission the clerk who docketed them assigned to the petition for the first period "Docket No. 1137" and to the petition for the second period "Docket No. 1136."

3. Testimony and argument having been heard by the Interstate Commerce Commission, an opinion was filed by said Commission on December 5, 1910, Opinion No. 1455, in which it was found that the defendant had unlawfully discriminated against the petitioner in the distribution of coal cars, as compared with other shippers similarly situated. Said Commission on March 11, 1912, filed a supplemental opinion No. 1833, assessing the damages for said unlawful discrimination at $50,307.05, with interest from June 28, 1907.

4. In Opinion No. 1455, above referred to, in discussing the two actions, the Interstate Commerce Commission treated the docket number of the first period as the docket number of the second period, and the docket number of the second period as the docket number of the first period. In the supplemental Opinion No. 1833, however, this error was corrected and the findings of fact and the division of the damages into two awards, according to the periods, were properly found and the correct amounts were awarded to the parties named in the respective periods.

5. Owing to the confusion caused by the manner in which the cases were originally docketed, and the reference to them in the original Opinion No. 1455, your petitioner in bringing suit upon the awards in your Honorable Court was led into error and filed the two petitions which it is now sought to amend, with the amounts awarded reversed as to the parties, that is the amount sued for on behalf of James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, for the first period—$31,715.57, should have

been $18,591.48, as appears by reference to the awards; and the amounts sued for on behalf of James H. Minds and Julia A. Matz, trading as Bulah Coal Company, for the second period—$18,591.48, should have been $31,715.57, as appears by reference to the awards.

6. These cases coming on for trial, the two petitions were consolidated by agreement of counsel and tried as one cause of action, James H. Minds being entitled to one-half of the amount awarded in each period in his own right and Julia A. Matz being entitled to one-half of the amount awarded in each period; in the first period as the Executrix and the sole legatee of William J. Matz, deceased, and the second period in her own right. The proposed amendments, therefore, introduce no new cause of action, nor any other parties than those already of record, nor do they alter the respective amounts due to those parties, but merely alter the petitions so as to make the averments therein contained agree with those in the awards upon which suit is brought, all of which appears upon the face of the record.

WHEREFORE your petitioners pray that they may be allowed to amend the petitions in the two cases as follows:

Amend petition No. 2422

By striking out from paragraph I the words "Thirty-one thousand seven hundred fifteen dollars and fifty-seven cents ($31,715.57)" and substituting therefor "Eighteen Thousand five hundred ninety-one Dollars and forty-eight cents ($18,591.48)." In the same paragraph by striking out the words "Nine Thousand three hundred and seventy-eight dollars and seventy-two cents ($9,378.72)" and substituting therefor "Five Thousand four hundred and ninety-seven Dollars and ninety-one cents ($5,497.91)." In the same paragraph by striking out the words "Forty-one Thousand ninety-four dollars and twenty-nine cents ($41,-

094.29)," and substituting therefor the words "Twenty-four Thousand eighty-nine Dollars and thirty-nine cents ($24,089.39)."

In paragraph V by striking out after the words "Docket No." the numeral "1136" and substituting therefor the numeral "1137."

In paragraph VI by striking out after the words "Docket No." the numeral "1136" and substituting therefor the numeral "1137."

In paragraph VII by striking out after the words "Docket No." the numeral "1136" in the two places in which it occurs in said paragraph and sustituting therefor in each place the numeral "1137."

In the Fourth prayer of said petition by striking out the words "Forty-one Thousand ninety-four dollars and twenty-nine cents ($41,094.29)" and substituting therefor the words "'Twenty-four Thousand eighty-nine Dollars and thirty-nine cents ($24,089.39)."

Amend petition No. 2424

By striking out from paragraph I the words "Eighteen Thousand five hundred ninety-one dollars and forty-eight cents ($18,591.48)" and substituting therefor the words "Thirty-one Thousand seven hundred fifteen Dollars and fifty-seven cents ($31,715.57)." In the same paragraph by striking out the words "Five Thousand four hundred ninety-seven dollars and ninety-one cents ($5,497.91)," and substituting therefor the words "Nine Thousand three hundred seventy-eight Dollars and seventy-two cents ($9,378.72)." In the same paragraph by striking out the words "Twenty-four Thousand eighty-nine dollars and thirty-nine cents ($24,089.39)," and substituting therefor the words "Forty-one Thousand ninety-four Dollars and twenty-nine cents ($41,094.29)."

In paragraph V by striking out after the words "Docket No." the numeral "1137" and substituting therefor the numeral "1136."

In paragraph VI by striking out after the words "Docket No." the numeral "1137" and substituting therefor the numeral "1136."

In paragraph VII by striking out after the words "Docket No." the numeral "1137" and substituting therefor "1136."

In the Fourth prayer of said petition by striking out the words "Twenty-four Thousand eighty-nine Dollars and thirty-nine cents ($24,089.39)," and substituting therefor "Forty-one Thousand ninety-four Dollars and twenty-nine cents ($41,094.29)," so that when amended the two petitions will read as the amended petitions attached hereto.

H. W. Moore,
Attorney for Petitioners.

State of Pennsylvania, }
County of Philadelphia, } *ss.*

John H. Minds, being duly sworn according to law, doth depose and say that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

John H. Minds.

Sworn to and subscribed before me
this fourth day of April, A. D.
1916.

P. A. Wilson,
(Seal) *Notary Public.*
Commission expires March 9, 1919.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

December Term, 1912. No. 2422.

JAMES H. MINDS, surviving and liquidating partner of JAMES H. MINDS and WILLIAM J. MATZ, lately trading as BULAH COAL COMPANY,
Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY.
Defendant.

AMENDED PETITION.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

Your petitioner, James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, having his principal place of business at Ramey, in Bigler Township, Clearfield County and State of Pennsylvania, and who is a citizen and resident of Clearfield County, in the said State of Pennsylvania, humbly complaining shows your Honors:

I. Your petitioner is lawfully and rightfully entitled to receive and does hereby claim from the defendant above named, the sum of Eighteen thousand five hundred ninety-one Dollars and forty-eight cents ($18,591.48), with legal interest thereon from June 28, 1907, to June 1, 1912, amounting to Five thousand four hundred ninety-seven Dollars and ninety-one cents ($5,497.91), being the sum of Twenty-four thousand eighty-nine Dollars and thirty-nine cents ($24,089.39), with legal interest thereon from June 1, 1912,

as and for damages and reparation in accordance with a report and order of the Interstate Commerce Commission, dated March 11, 1912, a copy whereof is hereto attached, marked "Exhibit A" and prayed to be made and read as part hereof, and in accordance with the several Acts of Congress in such case made and provided, and the defendant justly and legally owes to petitioner the sum above set forth, together with legal interest thereon from June 1, 1912, and a reasonable attorney's fee to be taxed as part of the costs against defendant.

II. The defendant prior to any and all dates mentioned was and now is a corporation incorporated under the laws of the State of Pennsylvania and a common carrier, engaged in interstate commerce by transportation of passengers and property by continuous carriage by railroad over their own lines and as connecting carriers from points of origin in Pennsylvania to points outside of Pennsylvania throughout the United States and to Canada and Mexico, and has its principal operating office in Philadelphia, Pennsylvania, in the Eastern District of Pennsylvania, through which said City and in which Eastern District of Pennsylvania the line of said defendant runs and is operated.

III. During the period from the twenty-fifth day of June, 1902, to October 1, 1904, the petitioner was lessee of valuable seams and veins of bituminous coal underlying lands situate in Bigler Township, Clearfield County, Pennsylvania, and operated thereon a fully equipped colliery known as Webster No. 4, which colliery was adjacent to the tracks of the Moshannon Branch of the Tyrone and Clearfield Railway, one of the main branches of defendant's line and operated by defendant as its Tyrone Division, and during said period, petitioner was continuously engaged in mining coal at said mines and selling it to points outside of

the State of Pennsylvania, and maintained at said colliery a full mining equipment and a sufficient force of employees. During the same period the daily capacity of said Webster No. 4 mine was five hundred and sixty (560) tons per working day, which quantiy petitioner was always able and prepared during said period to mine, ship and sell, had he been supplied by the defendant with sufficient cars to transport the same, but defendant did not furnish petitioner with sufficient cars to transport his coal as aforesaid, nor did it furnish a petitioner his proper pro rata of the cars upon defendant's line, but in its distribution of railroad cars to mines along its line the defendant unjustly discriminated against petitioner's mine, Webster No. 4, and gave undue and unreasonable preference and advantage to mines operated by the Berwind-White Coal Mining Company, and other shippers on the Tyrone Division, particularly to shippers whose mines were situated upon the Moshannon Branch of the Tyrone Division in close proximity to Webster No. 4 and having, in common with it, their sole outlet to market by way of defendant's lines, whereby defendant violated its duty as a common carrier and petitioner was put to great and unjust disadvantage and was unable to ship coal to market which he was able to mine, and for the sale of which he had orders for delivery to points outside of the State of Pennsylvania, and because of defendant's refusal to adequately supply petitioner's need for cars and because of such unjust discrimination against petitioner in the daily car distribution of cars upon defendant's line, and in particular upon the Tyrone Division, petitioner was damaged and suffered loss as producer, shipper and seller of coal in the interstate coal trade and was deprived of profits which he would otherwise have made upon coal which he was unable to ship and sell, and for which he was unable to accept contracts, although such contracts were available, by reason of defend-

ant's undue and wrongful discrimination and refusal to properly supply him with cars as aforesaid.

IV. The mines owned, operated and controlled by the Berwind-White Coal Mining Company, and other favored companies, as aforesaid, are situated upon the Moshannon Branch of the Tyrone and Clearfield Railway, on the Tyrone Division of said defendant in close proximity to the Webster No. 4 mine owned by petitioner, and have a common outlet with petitioner's said mine to reach the markets for bituminous coal, either within or without the State of Pennsylvania, over the lines of the defendant company, and there are no circumstances or conditions of carriage as against petitioner's mine, Webster No. 4, aforesaid.

Between June 25, 1902, and October 1, 1904, petitioner made daily requests and gave daily orders for coal cars to be delivered to his said mine, to be loaded with coal for transportation to points and places beyond the State of Pennsylvania, but was denied and refused cars and was unduly and unreasonably discriminated against by defendant in the distribution of coal cars, whereby petitioner was at different times and for varying periods of time compelled to close his operation and held his mine idle, whereby his miners and laborers removed, his organization and plant became demoralized and disorganized, and whereby petitioner was prevented from filling valuable contracts, to his great damage as herein set forth.

During the period from June 25, 1902, to October 1, 1904, the defendant arbitrarily assigned and furnished to the favored mines aforesaid in the Tyrone Division, not less than 105,521 "assigned" (arbitrary) cars, which said cars were assigned as "individual" and "foreign" cars, and were not charged against the *pro rata* share of said favored mines in making up the distribution sheets for said division, and did not enter into the distribution of the coal cars among the mines of said Division, whereby said favored com-

panies were given the cars aforesaid over and aboye and in addition to their fair *pro rata* of cars in the division, and were illegally and wrongfully preferred in car distribution as aforesaid in said division. And during the same period petitioner's mine, Webster No. 4, received only a few arbitrary cars, and they were charged against said mine's distributive share in the ratings for the division.

During the same period defendant unduly and unjustly discriminated against the Clearfield Division in which petitioner's said mine was located, by arbitrary award of not less than 640 coal cars per day to other divisions, for the use of favored mines in said divisions, over and above the proper proportion to which said divisions were properly entitled, to the prejudice of non-favored mines in the Clearfield Division, and in particular of your petitioner's mine, Webster No. 4.

V. Your petitioner, on the 28th day of June, 1907, duly filed with the Interstate Commerce Commission a complaint setting forth the unjust, unreasonable and discriminatory practice of defendant to the prejudice of petitioner and in violation of the Act to Regulate Commerce, approved February 4, 1887, and Acts amendatory thereof or supplemental thereto, and praying that a hearing be had upon the allegations set forth in said complaint, and that the Commission make an order awarding complainant therein reparation and damages to such amount as it might be ascertained that said complainant had suffered. Defendant, being duly served with a copy of said complaint, made answer thereto, issue was joined, and the cause regularly heard and argued by all the parties thereto, and submitted, and resulted in a finding duly filed and reported by the Interstate Commerce Commission at a general session at its offices in Washington, D. C., on Docket No. 1137, Opinion No. 1455, dated December

5, 1910, a copy of which finding, with the conclusions and orders of the Commission, is hereto attached and marked "Exhibit B" and made a part of this petition.

VI. After the filing of briefs by all parties and oral argument had at a general session of the Commission, and the submission of findings of fact and of law on the part of the complainant and of defendant, upon the question of reparation alone, there resulted a further finding regularly and properly made by the Commission on March 11, 1912, ordering the defendant to make reparation to petitioner as in paragraph 1 of this petition above set forth, and as fully appears in the copy of the report, conclusions and order of the Interstate Commerce Commission in Opinion No. 1833, Docket No. 1137, dated March 11, 1912, a certified copy whereof is hereto attached, marked "Exhibit A" and made a part of this petition.

VII. Petitioner avers that a true copy of the aforesaid orders of the Interstate Commerce Commission, dated December 5, 1910, Opinion No. 1455, Docket No. 1137, and March 11, 1912, Opinion No. 1833, Docket No. 1137, were duly served upon defendant in the above entitled cause and demand made that defendant pay petitioner the sum claimed in this petition and as set forth in the aforesaid order of the Commission, dated March 11, 1912, "Exhibit C," hereto attached, but that defendant has wholly failed, neglected and refused to pay the said sum or any part thereof, and that no such sum nor any part thereof has been paid by defendant or any one on its behalf to petitioner or any one in his behalf. Wherefore petitioner has instituted this proceeding to enforce the aforesaid order regularly and lawfully made under the Act to Regulate Commerce, approved February 4, 1887, and the acts amendatory thereof or supplemental thereto.

Wherefore the said James H. Minds, surviving

and liquidating partner of James H. Minds and William J. Matz, lately trading as the Bulah Coal Company, as aforesaid, respectfully prays:

FIRST.—That your Honorable Court enter a rule and order upon the said defendant, the Pennsylvania Railroad Company, to file a plea, answer or demurrer to this petition within thirty days from date of service of a copy of the same upon said defendant.

SECOND.—That your Honorable Court will, by its order, fix a time and place for the trial of this cause, under the provisions of the Act to Regulate Commerce aforesaid.

THIRD.—That your Honorable Court will hear, determine and adjudicate the matter involved in this cause hereinabove recited and the exhibits hereto attached.

FOURTH.—That your Honorable Court will enter judgment in favor of petitioner and against the said defendant, the Pennsylvania Railroad Company for the sum of Twenty-four thousand eighty-nine Dollars and thirty-nine cents ($24,089.39), as hereinbefore set forth, with legal interest thereon from June 1, 1912, and costs, including a reasonable attorney's fee.

FIFTH.—That your Honorable Court may take such other order or orders in the premises as the necessity of the case may require or as to your Honorable Court may seem meet.

And your petitioner, as in duty bound, will ever pray, etc.

(Sgd.) Jas. H. Minds.

State of Pennsylvania, *ss.*

James H. Minds, one of the above-named petitioners, being duly sworn according to law, doth depose

and say that the facts contained in the foregoing petition are true, to the best of his knowledge and belief.

(Sgd.) JAS. H. MINDS.

Sworn and subscribed to before me
this 31st day of January, 1913.
(Sgd.) JNO. B. MCGRATH,
(Seal) *Notary Public.*
My commission expires February 27, 1913.

(See copies of Reports and Orders of Interstate Commerce Commission on page 13 of Record.)

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 2424.

JAMES H. MINDS and JULIA A. MATZ, trading as BULAH COAL COMPANY,
Petitioners,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

To the Pennsylvania Railroad Company, Defendant in above case:

Attached hereto will be found a true copy of the order made by the Interstate Commerce Commission, dated March 11, 1912, Opinion No. 1833, Docket 1137, awarding to the complainants the sum of Eighteen Thousand five hundred ninety-one dollars and forty-eight cents ($18,591.48), with legal interest thereon from June 28, 1907, to June 1, 1912, as and for damages and reparations and in accordance with the re-

port and order of the Interstate Commerce Commission.

Demand for payment thereof is now formally made on behalf of the complainants, and unless payment of this award is received by February 5, 1913, a petition will be filed in the United States Court for the purpose of enforcing the order and award aforesaid.

(Sgd.) H. W. Moore,
Attorney for Petitioners.

IN THE
DISTRICT COURT OF THE UNITED STATES,
For the Eastern District of Pennsylvania.

December Term, 1912. No. 2424.

JAMES H. MINDS and JULIA A. MATZ, Trading as BULAH COAL COMPANY,
Petitioners,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

AMENDED PETITION.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

Your petitioners, James H. Minds and Julia A. Matz, trading as Bulah Coal Company, having their principal place of business at Ramey, in Bigler Township, Clearfield County and State of Pennsylvania, and who are citizens of the State of Pennsylvania, and respectively residents of Clearfield County and Schuylkill County, in the said State of Pennsylvania, humbly complaining show your Honors:

I. Your petitioners are lawfully and rightfully entitled to receive and do hereby claim from the defendant above named, the sum of Thirty-one thousand seven hundred fifteen Dollars and fifty-seven cents ($31,715.57), with legal interest thereon from June 28, 1907, to June 1, 1912, amounting to Nine thousand three hundred seventy-eight Dollars and seventy-two cents ($9,378.72), being the sum of Forty-one thousand ninety-four Dollars and twenty-nine cents ($41,094.29), with legal interest thereon from June 1, 1912, as and for damages and reparation in accordance with a report and order of the Interstate Commerce Commission, dated March 11, 1912, a copy whereof is hereto attached, marked "Exhibit A", and prayed to be made and read as part hereof, and in accordance with the several Acts of Congress in such case made and provided; and the defendant justly and legally owes to petitioners the sum above set forth, together with legal interest thereon from June 1, 1912, and a reasonable attorney's fee, to be taxed as part of the costs against defendant.

II. The defendant prior to any and all dates mentioned in this petition was and now is a corporation incorporated under the laws of the State of Pennsylvania and a common carrier, engaged in interstate commerce by transportation of passengers and property by continuous carriage by railroad over their own lines and as connecting carriers from points of origin in Pennsylvania to ~~points~~ outside of Pennsylvania throughout the United States and to Canada and Mexico, and has its principal operating office in Philadelphia, Pennsylvania, in the Eastern District of Pennsylvania, through which said city and which Eastern District of Pennsylvania the line of said defendant runs and is operated.

III. During the period from the first day of Octo-

ber, 1904, to the twenty-eighth day of June, 1907, the petitioners were lessees of valuable seams and veins of bituminous coal underlying lands situate in Bigler Township, Clearfield County, Pennsylvania, and operated thereon a fully equipped colliery known as Webster No. 4, which colliery was adjacent to the tracks of the Moshannon Branch of the Tyrone and Clearfield Railroad, one of the main branches of defendant's line and operated by defendant as its Tyrone Division, and, during said period, petitioners were continuously engaged in mining coal at said mine and selling it to points outside of the State of Pennsylvania, and maintained at said colliery a full mining equipment and a sufficient force of employees. During the same period the daily capacity of said Webster No. 4 mine was five hundred and sixty (560) tons per working day, which quantity petitioners were always able and prepared during said period to mine, ship and sell, had they been supplied by the defendant with sufficient cars to transport the same, but defendant did not furnish petitioners with sufficient cars to transport their coal as aforesaid, nor did it furnish to petitioners their proper *pro rata* of the cars upon defendant's line, but in its distribution of railroad cars to mines along its line, the dedefendant unjustly discriminated against petitioners' mine, Webster No. 4, and gave undue and unreasonable preference and advantage to mines operated by the Berwynd-White Coal Mining Company, and other shippers on the Tyrone Division, particularly to shippers whose mines were situated upon the Moshannon Branch of the Tyrone Division in close proximity to Webster No. 4, and having, in common with it, their sole outlet to market by way of defendant's lines, whereby defendant violated its duty as a common carrier and petitioners were put to great and unjust disadvantage and were unable to ship coal to market which they were able to mine, and for the sale of which they had orders for delivery to points outside of the

State of Pennsylvania, and because of defendant's refusal to adequately supply petitioners' needs for cars and because of such unjust discrimination against petitioners in the daily car distribution of cars upon defendant's line, and in particular upon the Tyrone Division, petitioners were damaged and suffered loss as producers, shippers, and sellers of coal in the interstate coal trade and were deprived of profits which they would otherwise have made upon coal which they were unable to ship and sell, and for which they they were unable to accept contracts, although such contracts were available, by reason of defendant's undue and wrongful discrimination and refusal to properly supply them with cars as aforesaid.

IV. The mines owned, operated and controlled by the Berwynd-White Coal Mining Company, and other favored companies, as aforesaid, are situated upon the Moshannon Branch of the Tyrone and Clearfield Railway, on the Tyrone Division of said defendant, in close proximity to the Webster No. 4 mine, owned by petitioners, and have a common outlet with petitioners' said mine to reach the markets for bituminous coal, either within or without the State of Pennsylvania, over the lines of the defendant company, and there are no circumstances or conditions of carriage as against petitioners' mines, Webster No. 4 aforesaid.

Between October 1, 1904, and June 28, 1907, petitioners made daily requests and gave daily orders for coal cars to be delivered to their said mine, to be loaded with coal for transportation to points and places beyond the State of Pennsylvania, but were denied and refused cars and were unduly and unreasonably discriminated against by defendant in the distribution of coal cars, whereby petitioners were at different times and for varying periods of time compelled to close their operation and hold their mine idle, whereby their miners and laborers removed, their organization and plant became demoralized and disorganized, and where-

by petitioners were prevented from filling valuable contracts, or from accepting and securing other valuable contracts, to their great damage as herein set forth.

During the period from October 1, 1904, to June 28, 1907, the defendant arbitrarily assigned and furnished to the favored mines aforesaid in the Tyrone Division, not less than 143,088 "assigned" (arbitrary) cars, which said cars were assigned as "individual" and "foreign" cars, and were not charged against the *pro rata* share of said favored mines in making up the distribution sheets for said division, and did not enter into the distribution of the coal cars among the mines of said division, whereby said favored companies were given the cars aforesaid over and above and in addition to their *pro rata* of cars in the division, and were illegally and wrongfully preferred in car distribution as aforesaid in said division. And during the same period petitioners' mine, Webster No. 4, received only a few arbitrary cars, and they were charged against said mine's distributive share in the ratings for the division.

During the same period defendant unduly and unjustly discriminated against the Clearfield Division, in which petitioners' said mine was located, by arbitrary award of not less than 640 coal cars per day to other divisions, for the use of favored mines in said division, over and above the proper proportion to which said division was properly entitled, to the prejudice of non-favored mines in the Clearfield Division, and in particular of your petitioners' mine, Webster No. 4.

V. Your petitioners, on the twenty-eighth day of June, 1907, duly filed with the Interstate Commerce Commission a complaint setting forth the unjust, unreasonable and discriminatory practices of defendant to the prejudice of petitioners and in violation of the Act to Regulate Commerce, approved February 4, 1887, and Acts amendatory thereof, or supplemental there-

to, and praying that a hearing be had upon the allegations set forth in said complaint, and that the Commission make an order awarding complainants therein reparation and damages to such an amount as it might be ascertained that said complainants had suffered. Defendant, being duly served with a copy of said complaint, made answer thereto, issue was joined, and the cause regularly heard and argued by all the parties thereto, and submitted, and resulted in a finding duly filed and reported by the Interstate Commerce Commission at a general session at its offices in Washington, D. C., on Docket No. 1136, Opinion No. 1455, dated December 5, 1910, a copy of which finding, with the conclusions and orders of the Commission, is hereto attached and marked "Exhibit B" and made a part of this petition.

VI. After the filing of briefs by all parties and oral argument had at a general session of the Commission, and the submission of findings of facts and of law on the part of the complainant and of defendant, upon the question of reparation alone, there resulted a further finding regularly and properly made by the Commission on March 11, 1912, ordering the defendant to make reparation to petitioners as in paragraph one of this petition above set forth, and as fully appears in the copy of the report, conclusions and order of the Interstate Commerce Commission in Opinion No. 1833, Docket No. 1136, dated March 11, 1912, a certified copy whereof is hereto attached, marked "Exhibit A," and made a part of this petition.

VII. Petitioners aver that a true copy of the aforesaid order of the Interstate Commerce Commission, dated March 11, 1912, Opinion No. 1833, Docket No. 1136, was duly served upon defendant in the above entitled cause, and demand made that defendant pay petioners the sum claimed in this petition and as set forth in the aforesaid order of the Commission dated March

11, 1912, "Exhibit C", hereto attached, but that defendant has wholly failed, neglected and refused to pay the said sum or any part thereof, and that no such sum nor any part thereof has been paid by defendant or any one on its behalf to petitioners or any one in their behalf. Wherefore petitioners have instituted this proceeding to enforce the aforesaid order regularly and lawfully made under the Act to Regulate Commerce, approved February 4, 1887, and the Acts amendatory thereof or supplemental thereto.

Wherefore the said James H. Minds and Julia A. Matz, trading as the Bulah Coal Company, as aforesaid, respectfully pray:

First—That your Honorable Court enter a rule and order upon the said defendant, the Pennsylvania Railroad Company, to file a plea, answer or demurrer to this petition within thirty days from date of service of a copy of the same upon said defendant.

Second—That your Honorable Court will, by its order, fix a time and place for the trial of this cause, under the provisions of the Act to Regulate Commerce aforesaid.

Third—That your Honorable Court will hear, determine and adjudicate the matter involved in this cause hereinabove recited and the exhibits hereto attached.

Fourth—That your Honorable Court will enter judgment in favor of petitioners and against the said defendant, the Pennsylvania Railroad Company, for the sum of Forty-one thousand ninety-four Dollars and twenty-nine cents ($41,094.29), as hereinbefore set forth, with legal interest thereon from June 1, 1912, and costs, including a reasonable attorney's fee.

Fifth—That your Honorable Court may make such other order or orders in the premises as the necessity of the case may require or as to your Honorable Court may seem meet.

And your petitioners, as in duty bound, will ever pray, etc.

(Sgd.) JAS. H. MINDS.

STATE OF PENNSYLVANIA, *ss.*

James H. Minds, one of the above named petitioners, being duly sworn according to law, doth depose and say that the facts contained in the foregoing petition are true, to the best of his knowledge and belief.

(Sgd.) JAS. H. MINDS.

Sworn and subscribed to before me
this 31st day of January, 1913.

(Sgd.) JNO. B. MCGRATH,
(Seal) *Notary Public.*
My Commission Expires February 27, 1913.

(See copies of Reports and Orders of Interstate Commerce Commission on page 13 of Record.)

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 2422.

JAMES H. MINDS, Surviving and Liquidating Partner of JAMES H. MINDS and WILLIAM J. MATZ, Lately Trading as BULAH COAL COMPANY,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY,

Defendant.

To the Pennsylvania Railroad Company, Defendant in above case:

Attached hereto will be found a true copy of the order made by the Interstate Commerce Commission, dated March 11, 1912, Opinion No. 1833, Docket No. 1136, awarding to the complainant the sum of Thirty-one Thousand seven hundred fifteen dollars and fifty-seven cents ($31,715.57), with legal interest thereon from June 28, 1907, to June 1, 1912, as and for damages and reparations and in accordance with the report and order of the Interstate Commerce Commission.

Demand for payment thereof is now formally made on behalf of the complainant, and unless payment of this award is received by February 5, 1913, a petition will be filed in the United States Court for the purpose of enforcing the order and award aforesaid.

(Sgd.) H. W. MOORE,
Attorney for Petitioner.

ANSWER OF THE PENNSYLVANIA RAILROAD COMPANY.
Filed April 8, 1916.

To the Honorable the Judges of said Court:

The Pennsylvania Railroad Company, the defendant in the above entitled action, respectfully submits that leave should not be granted to file the amended petition which the plaintiff asks leave to file, for the following reason:

The proceeding, as the petition discloses, is one brought to recover the amount of an award averred in the petition to have been made by the Interstate Commerce Commission on March 11, 1912.

The award, as now appears, for the recovery of which the proceeding was brought was not made in favor of the plaintiff, and the purpose of the present petition is to permit the plaintiff to so amend its original petition as to enable it now to recover the amount of an award which was made by the Interstate Commerce Commission in favor of the petitioner.

The Interstate Commerce Act provides that "a petition for the enforcement of an order (*i. e.*, of the Interstate Commerce Commission) for the payment of money shall be filed in the Circuit Court or State Court within one year from the date of the order, and not after."

The date of the order making the award for the recovery of which the the plaintiff now desires to proceed was, as already stated, March 11, 1912, so that at the present time more than four years have elapsed from the date thereof. The petitioner, therefore, it is respectfully submitted cannot now file a petition for the enforcement of such order.

FRANCIS I. GOWEN,
For Defendant.

April 8, 1916.

ORDER OF COURT.
Filed April 10, 1916.

And now, to wit, this 10th day of April, 1916, Amendment to Petition allowed, Exception noted for Defendant.

By the Court.

DICKINSON, *J.*

SUR AMENDED PETITION.
PLEAS.
Filed April 14, 1916.

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1. The defendant pleads "Not Guilty."

2. And for a further plea the defendant says that the plaintiff is not entitled to maintain the present proceeding because it says that the order of the Interstate Commerce Commission, for the enforcement of which the present proceeding has been instituted, was made on March 11, 1912, and by the Act of Congress under which said order was made, it is provided that a petition for the enforcement of an order of the character of that for the enforcement of which the present proceeding is brought, shall be filed in the Circuit Court within one year from the date of the order and not after the expiration of such year, and the defendant avers that the petition in the present case for the enforcement of the order making the award in favor of the plaintiff, the amount of which it is seeking to recover, was not filed in this Court within one year from the date of the order, as will appear by an inspection of the record.

FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For Defendant.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Of December Term, 1912. No. 2422 and 2424.

No. 2422. Dec. Term, 1912.

JAMES H. MINDS, Surviving and Liquidating Partner of JAMES H. MINDS and WILLIAM J. MATZ, lately trading as the BULAH COAL COMPANY,

Petitioner,

vs.

PENNSYLVANIA RAILROAD COMPANY.

No. 2424. Dec. Term, 1912.

JAMES H. MINDS and JULIA A. MATZ, trading as the BULAH COAL COMPANY,

vs.

PENNSYLVANIA RAILROAD COMPANY.

BILL OF EXCEPTIONS.
Filed Nov. 10, 1916.

Be it remembered, that in the said term of December, A. D. 1912, came the said plaintiffs into the said Court, and impleaded the said defendant in a certain plea of trespass, &c., in which the said plaintiffs declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the District aforesaid before the Honorable Oliver B. Dickinson, Judge of the said Court, the ninth

day of October, A. D. 1916, the aforesaid issue between the said parties came to be tried by a jury of the said District for that purpose duly impaneled (prout list of jurors), at which day came as well the said plaintiffs as the said defendant by their respective attorneys; and the jurors of the jury aforesaid impaneled to try the said issue, being also called, came, and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel of the said defendant did except to the rulings of the Court as herein appears.

Before Honorable OLIVER B. DICKINSON, *J.*, and a Jury.

Post Office Building, Philadelphia, Pa., Monday, October 9th, 1916, at 10 o'clock A. M.

Present:

JOHN H. MINDS, ESQ.,
JAMES A. GLEASON, ESQ.,
GEORGE M. ROADS, ESQ., and
H. W. MOORE, ESQ., for the Plaintiff.

FRANCIS I. GOWEN, ESQ., and
HENRY W. BIKLE, ESQ., for the Defendant.

Transcript of Testimony, Charge of the Court and Exceptions.

Jurors sworn and affirmed Monday, October 9th, 1916.

Mr. Roads opened to the jury on behalf of the plaintiff.

Mr. Bikle opened to the jury on behalf of the defendant.

Counsel agree that the two cases may be submitted to the same jury on the same testimony.

THE COURT: Gentlemen of the Jury, there are two cases being submitted to you. It is necessary for the reason given you that there be two cases, because the parties claimant are not precisely the same in each case, but each case grows out of the same transaction. The cases will be supported by the same evidence, by the same witnesses, so for the convenience of all concerned we are submitting both cases to you at the same time. But when you come to make your awards you will separate them and render your verdict in each case as if that were the only case submitted.

PLAINTIFFS' EVIDENCE.

MR. ROADS: If the Court please the plaintiff offers in evidence the report and order of the Interstate Commerce Commission under the hand and seal of the Commission, Opinion No. 1455, in a suit wherein James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as the Bulah Coal Company, is the plaintiff and the Pennsylvania Railroad Company is the defendant; and also in the suit wherein James H. Minds and Julia A. Matz, trading as the Bulah Coal Company, is the plaintiff against the Pennsylvania Railroad Company; the first one being numbered 1137 Interstate Commerce Commission number and the second No. 1136, dated December 5, 1910, and I propose to read from that report certain findings of fact.

MR. GOWEN: We object to the offer of the report as a whole in evidence. We have no objection to the admission in evidence of such portions of the report as contain findings of fact by the Commission.

THE COURT: Read upon the record what you regard as findings of fact which you are offering in evidence. I do not recall that this Act of Congress makes the report in its entirety evidence, but merely the findings.

MR. ROADS: We thought the proper way to offer the report was to offer the report and read certain extracts.

THE COURT: In order to preserve your position you offer it in your own form and counsel can put their objections in the form in which they wish them to appear, and we will give you a ruling on it.

Counsel for plaintiff may read upon the record what they deem to be findings of fact either in the report or in the order itself, and then, if any of those are objected to they will be passed upon by the Court and those admitted may be directed to the jury. The objection to this extent and within that limitation is overruled. Beyond that it is sustained.

MR. ROADS (reading): "On or about April 12th, 1904, a member of the copartnership that filed the first of these two complaints died and his place in the firm was taken by his widow."

THE COURT: Mr. Gowen, you understand that if any of these specific findings are objected to you are to note them.

MR. GOWEN: We have no objection to that.

MR. ROADS (reading): "* * * we find upon this record that the defendant, during the period covered by these actions, was guilty of an undue and unjust discrimination against the complainants by reason of the enforcement of the rules then in effect for the distribution of its available coal cars among the mining operations that it served."

"The mine of the complainants, known as Webster No. 4, is connected by a switch track with the defend-

ant's Moshannon branch. It produces a superior quality of soft coal that is used for steaming and forging purposes and also as a domestic coal; it is in good demand and brings a high price in the markets of consumption. The tipple, mining machinery, and the general development of the mine were designed for a shipping capacity of from 1000 to 1200 tons of coal per working day. Its capacity, as rated by the defendant in 1906, was 16 thirty-five ton cars per day, or 560 tons, indicating a maximum monthly output of 14,000 tons. At the same time the defendant rated Eureka Mine No. 7, about half a mile distant on the same mineral and surface estates and belonging to the Berwynd-White Coal Mining Company, at 14 cars per day."

"* * * the only point upon which the record affords a sufficient basis for affirmative findings grows out of the rules and system then in effect for the distribution of available equipment among the various coal mining operations. We have condemned that system in the cases heretofore alluded to and found it to be unduly and unjustly discriminatory, and we have so found here."

I read now the order of the Interstate Commerce Commission under its hand and seal at its general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the fifth day of December, A. D. 1910, stating the same cases:

"These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof, and it appearing that it has been the defendant's rule, regulation, and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage periods, to deduct the capacity in tons of for-

eign railway fuel cars, private cars and system fuel cars, in the record herein referred to as 'assigned cars' from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all 'unassigned' cars.

It is ordered, That the said rule, regulation, and practice of the defendant in that behalf unduly discriminates against the complainants herein and is in violation of the third section of the act to regulate commerce.

It is further ordered, That the question of the damages claimed by the complainants in these proceedings in respect of the matters and things in said report found to be discriminatory be deferred pending further argument in the premises."

MR. ROADS: I offer in evidence the opinion under the hand and seal of the Interstate Commerce Commission, No. 1833, in the cases already stated upon the record.

MR. GOWEN: We shall have to object to the admission in evidence of the thing as a whole. We have no objection to the admission of the findings of fact.

THE COURT: The objection may be entered. We understand that is in principle the same objection made before and the same ruling is made.

MR. ROADS (reading): "Following our conclusion in Bulah Coal Co. vs. P. R. R. Co., 20 I. C. C. 52, that the defendant had unlawfully discriminated against these complainants * * *"

MR. GOWEN: Mr. Roads has just come to the point where we make special objection.

THE COURT: This is the figure objection?

MR. GOWEN: We object to the admission in evidence of any portion of the report or opinion of the Commission which assesses the damages which in the

judgment of the Commission the complainants were entitled to on the ground that that is not a finding of fact within the meaning of the law.

THE COURT: Counsel may read into the record and to the jury any finding of facts incorporated in the order of what the amount of damages sustained by the respective complainants was.

Exception noted for defendant by direction of the Court.

MR. ROADS (reading): "Following our conclusion, in Bulah Coal Co. vs. P. R. R. Co. 20 I. C. C. 52, that the defendant had unlawfully discriminated against these complainants, we now assess the damages resulting therefrom at $50,307.05, with interest from June 28, 1907."

"In our previous report we took April 12, 1904, as the date for dividing the period of the action. Upon further reflection October 1, 1904, seems more proper, that being the date of the formation of the new co-partnership. In arriving at the foregoing amount of reparation we have therefore considered the matter in two periods, one prior and the other subsequent to that date, and make the following findings:

"(a) That the fair rating of the mine, fixed by the defendant without objection by the complainants, was 560 tons during both of the periods referred to.

(b) That 22 working days would in this case have been an average working month, although it is alleged that the mine could have been worked 26 days per month.

(c) That if the complainants had received their proper proportion of the cars available, for distribution they could have mined, sold and shipped 120,415.68 tons during the first period and 214.257.12 tons during the second period: that they actually shipped during the two periods 110,892 and 143,000 tons, respectively, making a shortage in their output of 9,523.68 tons in

the first period and 71,257.12 tons for the second period, and that of this tonnage 3,878.04 tons during the first period and 48,540.34 tons during the second period would have moved to and have been sold at interstate destinations.

(d) That the average profit on orders received by the complainants for points without the State of Pennsylvania, and which were canceled and unfilled as the result of lack of their fair proportion of available equipment, would have been 71.8 cents per ton during the first period and 25.2 cents per ton during the latter period. This measures the complainants' loss on the coal which they were unable to ship during the period of the action, and the damages allowed on this ground aggregate $15,016.60."

MR. GOWEN: I suppose that it would not be necessary to renew objection to each statement of the amount of the award as it occurs in these findings.

THE COURT: No. What I had in mind was that all he was going to read was the figures and it just occurred to me that the ruling is not as inclusive as it should have been. The ruling is that any finding of fact incorporated in the order may be read. This includes the finding as to the amount of the damages and exception is allowed to the defendant.

Exception noted for defendant by direction of the Court.

"(e) That the cost of production at the complainants' mine during the first period was $1.23 per ton on the average, and during the second period $1.08; that the cost of production would have been 88 cents per ton during both periods if a nondiscriminatory share of the car supply had been received, and that the excess in the actual cost of production of the coal mined and shipped to interstate destinations resulting from the discrimination in car supply was therefore 35 cents per ton during the first period and 20 cents

during the second period. This is the measure of the complainants' damages in the excess cost of production on the coal actually sold and shipped to points outside the State of Pennsylvania during the period of the action, and the damages awarded on that ground aggregate $35,290.45."

MR. ROADS: We now offer in evidence the orders of the Interstate Commerce Commission under the hand and seal of the Commission under the heading "Supplemental Orders":

"At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 11th day of March, A. D. 1912," under the heading "James H. Minds and Julia A. Metz, trading as Bulah Coal Company vs. The Pennsylvania Railroad Company."

MR. GOWEN: The defendant objects to the admission in evidence of the orders of the Commission referred to on the ground that they embody no findings of fact.

THE COURT: Is that the final order fixing the amount?

MR. ROADS: These are the final orders, yes.

THE COURT: Any fact, including the facts, if found, of the amount of the damage sustained by the respective parties, may be read upon the record and is admitted in evidence.

Exception noted for defendant by direction of the Court.

MR. ROADS (reading): "This case coming on to be heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together

with the report herein of December 5, 1910, 20 I. C. C. 52, and all the findings and conclusion in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby authorized and directed to pay unto complainants, James H. Minds and Julia A. Matz * *"

THE COURT: This is the order to pay the amount?

MR. ROADS: The order to pay the amount.

THE COURT: I do not think we are concerned with that. I thought this was the order fixing the amount which they thought to be the damage. This is merely directing them to pay.

MR. ROADS: Yes.

THE COURT: Of what value is that to us?

MR. ROADS: Because it states the purpose.

THE COURT: I am ruling that the figures are findings of fact, but we are not concerned with the other fact, that they were authorized to pay or directed to pay or requested to pay.

MR. ROADS: It gives the reason and the ground upon which that is ordered to be paid.

THE COURT: You may read upon the record the finding of the sum of $18,591.48, with interest thereon at the rate of 6 per cent. per annum, from June 28th, 1907, as the amount of reparation found for defendant's discrimination and distribution of coal cars, which discrimination is also found to have been unlawful and unjust.

MR. ROADS: I can begin then where I left off.

"It is ordered, That the above-named defendant be, and it is hereby authorized and directed to pay unto complainants, James H. Minds and Julia A. Matz, trading as the Bulah Coal Company, on or before the 1st day of June, 1912, the sum of $31,715.57, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, as reparation for defendants'

discrimination in distribution of coal cars, which discrimination has been found by the Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission."

MR. ROADS: In No. 1137 we offer in evidence the order and finding of the Interstate Commerce Commission under the hand and seal of the Commission in the case of James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as the Bulah Coal Company vs. The Pennsylvania Railroad Company, as follows:

"It is ordered, That the above-named defendant be, and it is hereby authorized and directed to pay unto complainant, James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as the Bulah Coal Company, on or before the 1st day of June, 1912, the sum of $18,591.48, with interest thereon at the rate of 6 per cent. per annum, from June 28th, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission."

JAMES H. MINDS, sworn.

By MR. ROADS:

Q. You are the plaintiff in these two suits, are you not? You are the James H. Minds that is mentioned as one of the plaintiffs in the second suit and the surviving partner of the firm of Minds and Matz?

A. Yes.

Q. State whether or not you received the amounts that were awarded the plaintiffs in this case by the Interstate Commerce Commission, from the defendant, the Pennsylvania Railroad Company?

A. I did not.

No cross-examination.

It is admitted by counsel for the defendant that the orders of the Interstate Commerce Commission were served upon the defendant company.

THE COURT: Is that made a condition precedent to your right to bring the action? Because if it is, you are entitled to have the fact that the order was made go in.

MR. ROADS: We have it in the admission, if your Honor please, that the copies of the orders of the Interstate Commerce Commission were served upon the Pennsylvania Railroad Company, and we have the testimony of Mr. Minds that they were not paid. I think that covers it.

If the Court please, subject to the right to make a claim and establish our claim for counsel fees under the statute, which we can do, I suppose, later in the case—

THE COURT: I do not see how that question can arise until the precedent fact of a recovery is determined.

MR. ROADS: I want to say that subject to that we rest.

THE COURT: What I had in mind, so far as the real issue is concerned here, the fact whether the Commission made an order or whether they did not make an order is of no value to us here. What we want to determine is the amount of damages to which you are entitled. But if the fact that they made an order is a condition precedent to your right to maintain this action, of course you could show it, because you could not show your right to maintain the action without it.

MR. ROADS: Yes, sir. I think that is in the Act.

THE COURT: I am not sure whether it is or whether it is not, but if you choose to re-offer that

you can use your own judgment about it, whether to leave the record as it stands or whether to re-offer the order.

MR. ROADS: Those final orders, your Honor, supplementary orders?

THE COURT: Yes. The thought in my mind was that we were really trying what might be called a feigned issue, and, therefore, the fact that the order was made is of no importance. The fact as to the amount of damages found is of importance, because the Act makes that evidence. So I excluded the order, that is, the order requiring payment, and permitted you to offer the evidence as a finding of fact.

MR. ROADS: We rather look upon the proceeding, not in the nature of a feigned issue, but as a judgment or an award, which goes in evidence in its entirety.

THE COURT: The point is—I suppose it is nothing more than a formality, perhaps—but what the record shows now is that you made an offer to prove that an order had been made to pay.

MR. ROADS: Yes, sir.

THE COURT: That I excluded as, in the view to which my attention was then directed, we had nothing to do with it. But if the order to pay is a *sine qua non* of your right to maintain the action, then of course you would be entitled to show it for that reason. If you are satisfied with the state of the record as it is, all right. If you want to re-offer it, you may do so.

MR. ROADS: We will make a formal offer of those supplemental orders of the Interstate Commerce Commission, two of them, under date of March 11, 1912, in evidence.

THE COURT: Do you wish to renew your objection?

MR. GOWEN: We object to that, yes, sir.

THE COURT: The objection is overruled and the order to pay is admitted, for the purpose of showing one fact, on which the plaintiff's right to maintain this action depends.

Exception noted for defendant by direction of the Court.

PLAINTIFF RESTS.

DEFENDANT'S EVIDENCE.

E. C. DAVIS, having been duly sworn, was examined as follows:

By MR. BIKLE:

Q. You are, I believe, in the employ of the Bulah Coal Company?

A. Yes, sir.

Q. Were you in the employ during the years 1902-1909 inclusive?

A. Yes, sir.

Q. And in what capacity?

A. As bookkeeper and shipping clerk.

Q. Were you familiar with the royalty paid by the Bulah Coal Company on the coal which it mined?

MR. GLEASON: We would respectfully ask counsel at this time to make an offer of what he proposes to prove by the witness on the stand.

MR. GOWEN: The defendant proposes to prove what the additional cost would have been of mining and producing the additional coal which the Commission found the plaintiff should have received cars for.

MR. GLEASON: For what purpose?

THE COURT: Oh, I think the purpose of it is sufficiently evident, Mr. Gleason. That is what they propose to show, what the cost of it would have been. Your damages would not have been—could not have been—anything except what you would have received over and above the cost.

MR. GLEASON: What is there here before the Court, your Honor, at the present time that would make this testimony competent or material? There is nothing before your Honor except the awards. Now in the light of what proposition or what evidence now before the Court—

THE COURT: I assume that your evidence, the evidence that you have produced, was brought in for the purpose of convincing the jury that your damages were a certain amount. I suppose the quest upon which the defendant is starting is to convince the jury, if the facts justify that finding, that your damage was not that much, but less than that, or perhaps nothing at all. I do not know. Is it objected to?

MR. GLEASON: We object to the testimony as incompetent, immaterial and irrelevant.

Objection overruled. Exception noted for plaintiff by direction of the Court.

(Question read, as follows: "Were you familiar with the royalty paid by the Bulah Coal Company on the coal which it mined?")

A. Yes.

By MR. BIKLE:

Q. How much did it pay per ton during the years 1902-1907 inclusive?

THE COURT: Let me understand; is that from 1902 to 1907?

MR. BIKLE: Inclusive.

THE COURT: Both inclusive, both years?

MR. BIKLE: Yes, sir.

A. Ten cents. I think there was some small amounts of 12.

Q. On what coal did you pay 12 cents? Was it during any particular period, or was it on some particular kind of coal?

A. I think it was on some particular kind of coal.

Q. And what kind?

A. I do not know. I think it was off a certain tract.

Q. Ten cents per ton was the minimum royalty on any of the coal covered by the Bulah Coal Company's operations?

A. Yes.

Q. Was that payable on every ton mined?

A. Yes.

Q. What was the rate of wages paid during the period from July, 1902, to June 30, 1907, or rather what were the rates paid to the miners?

A. That would be pretty hard to just recall, the wages at that time, period, without the records.

Q. Do you not recall, Mr. Davis, of having testified in this same case a year ago as to these rates?

A. Yes, it is in the record, but I do not just recall the wages. There were different rates.

THE COURT: Is there any objection to his referring to the memorandum? We might as well shorten it as much as we can and relieve the jury of as much labor as we can. Please just refer to that record, and if you find you are able tell us what the rates then prevailing were, let us know.

(Record of previous trial shown witness.)

THE COURT: Perhaps you can compare your figures and there will be no difference between you.

MR. MINDS: We are perfectly willing to agree that what he testified to last time shall be read into the record.

MR. BIKLE: Can we not agree, just to shorten it, that the mine rate was 62 cents for a definite period and 66 cents for another period?

MR. GLEASON: Yes.

By MR. BIKLE:

Q. So that it is a fact that the rate of pay to the miners was 62 cents per ton up to April, 1903, and thereafter it was 66 cents per ton?

A. 62 and 66, yes.

Q. And during those periods?

A. Yes.

Q. And that amount was payable on every ton actually mined?

A. Yes.

Q. Can you tell about what proportion of your coal paid that 12-cent royalty?

A. No, I cannot, but it was only a small proportion of it.

Q. Could you tell from your records, by an examination?

A. I do not know. We have it in the records. It would be quite a job to pick out. It was in little bits along through the periods.

ROY A. HATFIELD, having been duly sworn, was examined as follows:

By MR. BIKLE:

Q. What is your occupation?

A. Coal miner and shipper.

Q. How long have you been engaged in that business?

A. Since 1897; since 1901 in this district; the Clearfield District.

Q. In the general district where the Webster No. 4 mine is located?

A. The same district, that pays the same mining rates, yes.

Q. Are you familiar with the conditions that surround the production of coal?

A. Yes, sir.

Q. It has been shown by the evidence that was introduced in this case on behalf of the plaintiff that they actually mined and shipped, during what is described as the first period of the action, 110,892 tons of coal.

THE COURT: Let me inquire now, what you and Mr. Roads referred to as periods, is that a reference to the same dates that separate these two actions?

MR. BIKLE: The first period is the period outlined by the Commission as extending from July 1, 1902, to October 1, 1904.

MR. ROADS: That is right.

THE COURT: How does that compare with the division as between the different claims here?

MR. BIKLE: It is the same, your Honor.

THE COURT: That is what I wanted to get clear. I assumed it was the same. It may be important that the jury have that in mind as they go along, so that when you are referring to one period I think it would be well to designate it as such-and-such case, so that they will know what refers to one and what refers to the other.

MR. BIKLE: I shall do so, your Honor.

MR. GLEASON: In order that we may understand this plainly, your Honor, I would like the purpose of this testimony to be stated.

THE COURT: Oh, well, is it not sufficiently indicated, Mr. Gleason?

MR. GLEASON: If it is indicated by that one proposition, if it does not go any farther than that, it is sufficiently indicated; but I apprehend, your Honor, if we had a general purpose stated, we would know where we are at and would expedite it.

THE COURT: Is there any objection to stating what the purpose of this is?

MR. BIKLE: None, your Honor. We offer to prove by the witness on the stand that had the additional coal been mined which the Interstate Commerce Commission found that the plaintiff should have received cars for, in the two periods covered by their orders, the cost of producing the coal would not have been reduced to the extent which the Interstate Commerce Commission found it would have been by the amount of that increased output. The same offer made at the previous trial.

MR. GLEASON: The offer and the testimony of the witness is objected to unless it is shown that the witness is familiar with the testimony offered before the Interstate Commerce Commission, which the testimony of the witness in this case proposes to attack.

THE COURT: The objection is overruled and exception noted for the plaintiff. I understand what they are really proposing to do is to determine, assuming that there was a shortage of shipping in coal, what the amount plaintiffs would have received would have been had there been no shortage. That is substantially it, is it?

MR. BIKLE: We are not attacking the evidence before the Commission. We are attacking the findings.

THE COURT: Oh, I understand. This is introduced as bearing upon the question of what the

damage to the plaintiff was by reason of their not having made the shipments which it was found that they might have made.

MR. BIKLE: Exactly.

By MR. BIKLE:

Q. The Interstate Commerce Commission has found that during what is described as the first period of the action, that is, the period extending from July 1, 1902, to October 1, 1904, the plaintiff actually mined and shipped 110,892 tons of coal, and with the additional cars which the Commission found they should have received, they might have mined and shipped in addition 9523.68 tons. What, if any, additional cost would necessarily have been involved in mining and producing those 9523.68 tons of coal?

A. The additional cost would have been made up of the cost of the miner in digging the coal and putting it in the mine cars, for which he is paid a price that is known throughout the region. In addition to that, an additional cost would have been the royalty on the coal that was extracted per ton.

Q. Have you made a calculation as to what that would have been?

A. I presume I can use my figures, which I made myself?

Q. Will you please state what that would be?

A. The cost during that period of loading a ton of coal, as known throughout the Clearfield Region, in which these mines are located, was an average cost of 63 cents per gross ton. The royalty throughout the Clearfield Region, and particularly from the evidence of the previous witness, would be 10 cents per ton, making a total cost that could not possibly be avoided on the 9523 tons, of 73 cents per ton.

By THE COURT:

Q. You referred to it as the cost of loading. I assume that that means that the cost, the 63 cents, so far

as the wages element is concerned, includes all the labor bestowed on this up to the time that it is in the car; is that it?

A. Up to the time it is in the mine car in the mine, in the place. The miner who digs the coal and loads it in the mine car receives that price.

Q. What I want to get clear is, that when you refer to 63 cents as the cost of loading, that includes all the miner does up to the time that he loads the coal in the mine car; is that right?

A. That is correct.

By Mr. Bikle:

Q. Will you just state what that would be? Have you figured the total dollars?

A. The cost of 110,892 gross tons at the price stated, of $1.23, would be $136,397.

Q. You said $1.23. What is that figure? The figure which the Commission found it actually cost them?

A. That is the price that the Commission said that it actually cost. That was for this 110,892 tons. That is only the cost of the coal that the Commission found was shipped.

Q. At the figure that the Commission found it cost them?

A. Yes, sir. They also found that they should have shipped 9523 tons additional, for which they could not have avoided paying 73 cents a ton additional.

Q. What would that have made as a total amount additional, in dollars and cents?

A. The total amount additional would have been $143,348.79.

Q. Is not that the aggregate of the additional cost?

A. Yes, of the two.

Q. What would have been the additional cost, the aggregate in dollars? You have stated the additional cost is 73 cents per ton. Now what is that for the 9523 tons?

A. For the 9523 tons the additional cost would have been $6951.79.

Q. What would that have made as an average cost for the total tonnage, both that which was mined and shipped and the 9523 additional tons which the Commission found might have been mined and shipped?

A. That would have made the lowest possible cost for the total amount $1.19.

By Mr. Gowen:

Q. Per ton?

A. Per ton; per gross ton.

By The Court:

Q. May I get these figures? You give as your estimate, as I understand it, the minimum ton unit cost as $1.19?

A. Yes.

Q. Now that would apply on a calculation of how many tons?

A. That would apply on a calculation of 120,415 tons.

Q. Those figures, then, will give you the aggregate cost of dollars?

A. Yes, sir.

Q. Of shipping the whole amount, which, from that finding, assuming 9523 additional, should have been mined; that will give you the aggregate cost of mining and producing the total?

A. Yes, sir; a cost that could not be avoided.

Q. I understand. You fix $1.19 as the minimum cost of mining and production of that amount?

A. Yes, sir.

Q. So that the aggregate will be $1.19 multiplied by 120,415?

A. Yes, sir.

Q. Have you the figures there?

A. Yes, sir.

Q. Just give me your figures; I mean what you make the aggregate?

A. $143,348.79.

Q. That is your multiplication of those two sums, two figures?

A. Yes, sir.

By Mr. Bikle:

Q. During the second period of the controversy, which extends from October 1, 1904, to and including June 30, 1907, the Commission found that the complainants actually mined and shipped 143,000 tons, and that that cost them an average of $1.08 per ton. What would the aggregate cost of the coal actually mined and shipped be on the basis of those figures?

A. 143,000 tons at $1.08 is $154,440.

Q. Now the Commission found that the complainants during this second period might have mined and shipped an additional tonnage of 71,257.12 tons. What, if any, expenses would necessarily have been incurred in the mining and producing of that coal?

A. There would have been the cost of the average pick-mined price during that period, which was 63 cents. There would have been the royalty of 10 cents per ton; a cost of gathering and delivery of 7 cents; cost of ventilation and mine supplies 6 cents; which makes a total cost of 86 cents. Therefore the 71,257 tons, if shipped, could not have escaped a cost of $61,281.

Q. What would that make as the aggregate cost for the tonnage which actually was mined, produced and shipped, and for this additional 71,257 tons which might have been mined and shipped and then the average cost per ton?

A. The average cost per ton would have been $1, and is the lowest possible cost at which that tonnage could have been shipped.

By The Court:

Q. That would apply to what?

A. To 214,257 tons.

By Mr. Bikle:

Q. During this so-called second period, extending

from October, 1904, to June, 1907, you have included two items other than the mine rate and the royalty, which you did not include for the first period. Why did you do that?

A. Because of the fact that the increase in tonnage is 50%, which would necessitate the employment of more men, the purchasing of more rails and other mine supplies, more attention to ventilation on account of more men being underground, than it would to produce a tonnage that was only 140,000. I would like to state that, in the first period, there was no addition for gathering and delivery or for ventilation and supplies, because the tonnage is small.

By The Court:

Q. Let us see if we understand. Therefore you assumed that for that relatively small increase in tonnage, to wit 9523 tons, there would have been no calculable increase in the cost of mining and production, but where the increase is as much as a 50% increase, then, in your judgment, that would have involved an additional cost, the items of which you have given us, which together amount to 13 cents; is that the idea?

A. That is correct. With your permission I would like to explain it a little further. From my experience, the handling of 800 tons a month more, which is the amount in the first period, would probably not involve much additional expense in day labor, although you could not have loaded it in the mine cars for nothing. They would have to be paid the regular rate. With a large tonnage, which amounts to practically 6000 tons a month, additional day labor, supplies, etc., would have to be provided.

By Mr. Bikle:

Q. The Commission found, as I have stated, that during this period from June 1902, to October, 1904, the average actual cost per ton was $1.23, and that, with an additional output of 9523 tons, the average cost of

production would have been 88 cents. Have you made a calculation to show what the aggregate cost—

MR. ROADS: Objected to, because the question embodies facts not embodied in the Commission's reports or any evidence in this case.

THE COURT: Of course, to the extent to which the offer is a statement of fact and not a question, it is objectionable and will have to be put then hypothetically.

(Question withdrawn.)

Cross-examination.

By MR. GLEASON:

Q. Where do you live?

A. I live in Norristown, Pa.

Q. As the jury I presume know, that is a short distance from Philadelphia?

A. Yes. That is, my residence is there, yes.

Q. Those figures that you hold in your hand; where did you get them, Mr. Hatfield?

A. I secured them from the agreements covering the scale wages between the miners and the operators in the Clearfield District and verified those agreements by my own cost books.

Q. You do not understand my question. That statement that you hold now in your hand, the whole statement; where did you get it?

A. Made it myself, sir, from the facts.

Q. You got no knowledge from anybody else at all, no information?

A. No.

Q. Do you mean to say that every figure there is brought out of your own mind?

A. Every figure on here came out of my own mind.

Q. You got no information that is on that paper from anybody else?

A. Previous to the former trial of this case I read

over the facts in the matter. I also received the tonnages and the prices herein stated from Mr. Gowen.

Q. Oh. Now you did get certain figures—

A. I understood you to ask me how I made these calculations.

Q. There are certain figures, then, that you did get from Mr. Gowen?

A. Only the quantities.

Q. You got no prices at all from Mr. Gowen? Look at your paper.

A. Yes, the price by the Interstate Commerce Commission. However, I remembered that price, Mr. Gleason, from reading over the bills.

Q. You remembered it, but you did get it from Mr. Gowen?

A. I had it repeated to me.

Q. During the date of the first period you were not in the Clearfield Region, were you?

A. Yes, I have been in the Clearfield Region since 1901.

Q. Where had you come from to the Clearfield Region?

A. I had not operated coal mines under my own operation; I had ownership or interest in mines, with which I was familiar, previous to that.

Q. I mean, where did you live? Where was your residence previous to that?

A. Always at Norristown. In Norristown in the last 17 years, above it in the previous time.

Q. Have you ever been at the Webster No. 4?

A. You refer to the mine at Ramey?

Q. Yes.

A. I have only driven by there.

Q. You drove by on the township road?

A. Yes.

Q. Was it a shaft or a slope?

A. I was not inside of the place.

Q. That is, you do not know the kind of a working it is at all, whether it is a shaft or a slope?

A. I do not recall. If it is a slope, it may only show inside of the drift mouth.

Q. In order that the jury may understand, you do not know anything about this mine yourself, do you?

A. About this particular mine?

Q. Yes.

A. I know about the general practices throughout this region.

Q. I am asking you if you know anything about this mine yourself, of your own knowledge?

A. Not by examination of the mine.

Q. Have you ever been in it?

A. No. I said that before.

Q. You have never been in it?

A. No.

Q. You do not know how far, of your own knowledge, the face of the working is from the mouth of the shaft or slope?

A. No, I do not.

Q. You do not know anything about the difficulties under which the plaintiff labored during either the first period or the second period, of your own knowledge?

A. No, I would not know that.

Q. If a mine did not work one full day in a year by reason of the lack of cars supplied, would that increase or decrease the cost of the production of the coal?

MR. GOWEN: I do not want to object, of course, to anything that Mr. Gleason wants to ask, but they have proven, as a part of their case, by introducing the findings of the Interstate Commerce Commission to that effect, that, in the first period, we will say, there were so many tons mined at a given cost per ton. Now that is their own evidence. We have called Mr. Hatfield simply to prove—what was a matter that could not be disputed anyhow, under Mr. Davis' testimony—that the additional 9000 tons would have cost so much more to

mine, and that consequently, if that coal had been mined, the aggregate cost of producing all of the coal, as well that mined as well as that which the Commission said ought to have been mined, would have been so much a ton. Now Mr. Hatfield has not undertaken to say nor to deal at all—we did not ask him to—with the question of the cost of mining the coal there which was produced. The Commission has found that and the plaintiffs have proven that as part of their case by putting in the finding of fact. Now we had precisely this same question in the former trial, when Mr. Connor was on the stand, and your Honor then ruled out all these questions, upon the ground that Mr. Connor was not testifying as to whether that was a reasonable cost, the cost which the Commission had found—had not anything to do with it.

THE COURT: If I catch the theory of the cross-examination, it is not directed to that feature of it at all, Mr. Gowen, but to the estimate which this witness puts upon what would have been the cost of the additional tonnage had it been mined.

(Objection withdrawn.)

At 12:45 a recess was taken until 1:30 p. m.

1:30 p. m.

Roy A. Hatfield, cross-examination resumed.

By MR. GLEASON:

Q. Did Mr. Gowen tell you, in the making of this estimate, that this mine had worked irregularly? Did Mr. Gowen give you any information, to go with this information, that Webster No. 4 had worked very irregularly, because of the car shortage?

MR. BIKLE: We object to the form in which

that is asked. It is entirely permissible to inquire whether he told him the conditions of mining at that time, but to suggest what is not in the record as to conditions we think is not permissible.

MR. GLEASON: It is absolutely in the record —not in this record, but it is in the record of the Commission.

THE COURT: The objection has this basis, that it at least implies a statement of fact. That is substantially the objection.

MR. GLEASON: Your Honor, why should we not bring before this jury the conditions—

THE COURT: That is not the point, your bringing them before the jury, but the manner in which you are bringing them. You must bring them before the jury by asking a question and having the question answered. That is the objection —not distinguishing between what is a statement by counsel and what is a question.

MR. GLEASON: This is an absolutely hypothetical basis, so far as this witness is concerned, and we have a right to inquire into the elements by which he arrived at his conclusion.

THE COURT: You have the right to inquire, that is unquestioned, and inquire in your own way and frame your questions according to your own judgment; but the inquiry must be an inquiry, and counsel under the guise of inquiring cannot make statements, or under the guise of cross-examining cannot testify. That is the point of the objection.

(Question read.)

MR. BIKLE: The objection is made because there is no proper foundation for that question.

THE COURT: In so far as it is a question it is admissible, and put in the question form it is,

whether Mr. Gowen told you that fact or made any statement to that effect.

A. Mr. Gowen stated to me the conditions as I have previously stated them.

By Mr. Gleason:

Q. He stated what?

A. To me the conditions as I have previously stated them.

Q. Did he state that this mine had been working irregularly on account of shortage of cars?

A. I think when I read the bill before the Interstate Commerce Commission that that was alleged.

Q. It was alleged; and then you did read about that, did you?

A. My recollection is that I did.

Q. Did you read the testimony?

A. It is so long ago, Mr. Gleason; I read I think everything at that time. It has been so long I cannot tell you much about it.

Q. What is your recollection? Did you read the testimony?

A. I think I read it, but I do not think I could tell you much about it, because it has been a good while ago.

Q. Do you remember reading in the testimony, and as bearing on this estimate of yours, that in 1902—

Mr. Bikle: This is objected to. This is an effort to import into this record what is an entirely different record through a pretense of a question.

The Court: Your questions must be questions and not statements by counsel in the guise of questions.

Q. In the reading of that testimony, and as bearing upon your calculation here, did you read in the testimony that the mine in 1902 did not work one full day?

A. I do not remember.

Q. So that did not enter into your calculation?

A. No.

Q. Did the question of car shortage enter into this calculation at all?

A. That question cannot be properly answered the way you put it.

Q. Why?

A. As I understand it the 9523 tons would have made up all the cars you should have received. Is that correct?

Q. That is what you have said?

A. And if that had been mined, you would have had to pay 73 cents a ton for mining it.

Q. That is what you said. I ask you again, in this estimate that you made up on this paper you have in your hand, did you take into consideration the question of the shortage of car supply?

A. I did, provided the Interstate Commerce Commission took this 9523 tons as an estimate of shortage of car supply.

Q. Then if the Interstate Commerce Commission took that into consideration, so did you, is that right?

A. If that represents that amount, then I did, based only on the Interstate Commerce Commission.

Q. Then your figures—

A. I have no knowledge of your shortage of cars.

Q. Then your figures and the Interstate Commerce Commission figures agree?

A. I presume they do, as to the calculation I made.

Q. And you would dispute then the fact that this coal should have been produced there at 88 cents, providing there had been no discrimination found in the car supply?

A. I cannot answer that question.

Q. You cannot answer that question; do you dispute it?

A. I do not see how it could be mined for 88 cents.

Q. You do not see how it could be mined for 88 cents; you mean that is a low figure?

A. I mean if you had mined the coal that the Interstate Commerce Commission said you should have received cars for together with what you did mine at the cost established in the Interstate Commerce Commission report, it would have cost you $1.19 to mine the whole.

Q. Don't you know that you took this figure that you started out with, $1.23, from Mr. Gowen as a finding of the Interstate Commerce Commission?

A. I know that the Interstate Commerce Commission found $1.23, which I have not questioned or taken into consideration, whether it is right or wrong.

Q. You know that of your own positive knowledge?

A. I remember that figure in reading over the report.

Q. What report did you read?

MR. BIKLE: That is in evidence in this case.

THE WITNESS: I read it in the printed books. I do not know whether two or three sets of printed books or how many sets were gotten up.

Q. That is where you got that?

A. I remember that figure from the printed books.

Q. You just take that as a figure from the printed book?

A. I took it as I presume that the Interstate Commerce Commission decided that that was the figure.

Q. Of what?

A. Of the cost of the coal that you did mine and ship.

Q. Did you not take the other figure also from the Interstate Commerce Commission report; where did you get your 88?

A. You mean the 73 cents?

Q. Where did you get your 88?

A. I did not get any 88. You asked me about 88 cents.

Q. Did you read that in the report?

A. I am not certain, but I think I did.

Q. To get it to your attention a little more fully, did you read in the report the Interstate Commerce Commission found that if there had not been discrimination in car supply, that we could have mined and produced coal and shipped our allotment at a cost of 88 cents a ton?

A. I do not remember the exact figure.

Q. You remember of some figures?

A. Yes, but I cannot tell you what they are.

Q. If it is 88 cents, will you dispute it under the conditions that were laid before the Interstate Commerce Commission?

A. I do not understand that I am here to dispute any question that has been settled already.

Q. You were not here to testify as to any question that is found by the Interstate Commerce Commission, is that your understanding?

A. I understand that is the case, except as to what would have been the cost of the coal if you had received the cars for this additional tonnage.

Q. If then, the Interstate Commerce Commission has found as a fact that we could have mined, had we been given our allotted share of the cars in the Clearfield Region, and no discrimination had been practiced against us, and if they found as a fact that we could have mined and produced that coal at 88 cents a ton, do you dispute that?

A. I have not figured it up on that basis.

Q. This is an entirely different basis from what the Commission figured?

A. I presume so, I don't know.

THE COURT: Let me understand. You are asking him as to a cost price of 88 cents as the figure at which this coal might have been produced had the full quota of cars been supplied. Is that figured on the basis that the actual quantity of coal which you did mine, plus the 9523, or that

much more, had been mined, could have been mined at a unit ton cost of 88 cents, is that what your question meant?

MR. GLEASON: Yes.

THE COURT: Is not that the same unit cost which Mr. Hatfield gives us at $1.19?

MR. BIKLE: Yes.

MR. GLEASON: Absolutely no.

THE COURT: It certainly is, if your question meant what I understand you now to say it did mean. Let me put it again, and see whether we understand each other. You were speaking about a unit ton cost of 88 cents?

MR. GLEASON: 88 cents as found by the Commission.

THE COURT: If you had received your full quota of cars, received all you were entitled to at the full amount which you then would have mined, that you would have mined it at a cost of 88 cents?

MR. GLEASON: Yes.

THE COURT: What you would have mined was what you actually did mine plus 9523 tons, was it not?

MR. GLEASON: Yes.

THE COURT: What actually was mined, plus 9523 more tons, is what Mr. Hatfield says in his judgment would have cost $1.19 a ton to have mined and produced?

MR. GLEASON: Yes.

THE COURT: Then put the question that way to Mr. Hatfield.

MR. GLEASON: I am asking him if he disputes, having read the testimony, that the statement or finding of the Interstate Commerce Commission—

THE COURT: The witness is not here to dispute anything. He is here to testify to facts within his knowledge.

MR. GLEASON: Then we have a perfect right to get that before the jury.

THE COURT: Certainly. You can ask him whether or not his judgment is such and such, providing you make it clear tc what shipping problem the 88 cents cost pertains. As I understand Mr. Hatfield, he does not know whether there was any shortage of cars or not. He does not know whether you would have shipped that 9500 more tons had you been supplied with more cars or whether you would not, and he has given a statement that if you had shipped 9523 tons more than you did ship, the figures of which are also given, then in his judgment, what would it have cost to have mined and produced it, and he has given us his figures, which I understand to be $1.19. Is that correct?

THE WITNESS: Yes, but I have not that data at hand on which the Commission bases—

By MR. GLEASON:

Q. Is not the cost of coal, the production of coal, a variable figure, depending on a great many circumstances, such as irregularity of car supply, labor troubles, shortage of car supply; is it not a variable figure?

A. Somewhat variable, but not as to the pick mine rate. That is a fixed rate, fixed price.

Q. The mine rate per ton and the royalty, that is substantially fixed?

A. Yes.

Q. But are not the other elements entering into the cost of production of coal by the ton variable elements, depending largely upon circumstances?

A. To some extent.

Q. If in a car supply, your cars would be shipped

into the mine at 9 or 10 o'clock, and then have to hold your men, your day men, idle, would that not affect the price of the cost of a ton of coal, if the cars intended for you were not put into operation until 9 or 10 o'clock in the morning, your day men's time running from the time they came to the mines, would that not increase the cost per ton of coal in its production?

A. It might, probably would.

Q. Would it not as a fact; is there a question about that?

A. I think there is no question but what it would increase.

Q. And would it not increase it decidedly?

A. You mean for that day?

Q. Yes.

A. Yes, for that particular day.

Q. Every time that would occur, would it not be an added increase in the cost of the production of each ton of coal?

A. Yes, provided that very extreme condition you state would occur.

By The Court:

Q. As I understand what that means is this, if you are having men idle, that adds to the unit cost of the work they do?

A. For the whole day.

Q. For the whole time?

A. Yes.

By Mr. Gleason:

Q. When you estimated your lowest cost of the production of a ton of coal in these two periods, you discriminated some and had more items in your cost production in the last period than you had in the first, is that correct?

A. Yes.

Q. You, for instance, said that the ventilation I think you added?

A. I added supplies to that.

Q. You mean to say as a coal expert that you do not need ventilation during the first period?

A. No, I think not; I would not say that.

Q. That is you need ventilation when there are men working in the mines?

A. But you already have it under the tonnage, a slight increase in tonnage would not add any to your cost of ventilation in my judgment.

Q. You said that the pick rate was 62 cents?

A. Yes.

Q. And you added 10 cents?

A. In which period?

Q. The first period?

A. I said the pick mine rate was 63 cents.

Q. And you added 10 cents for royalty, making 73?

A. Yes.

Q. Did the mine need ventilation, any air at that time at all?

A. I think the tonnage you were producing would provide all the ventilation there would be needed. For this additional small tonnage, it was only 9523 tons.

Q. You have added nothing for ventilation in there?

A. My judgment is that the day men that would be employed to get out a large tonnage such as 110,892 tons, would provide all the ventilation needed to get out the small additional amount. In other words, you will not need any more day men. If you think you do, that is another matter.

Q. If I was a mine owner and thought I did, I would be correct?

A. But I have given you the benefit of the doubt.

Q. You have given me the benefit of a doubt on a mine you drove by and never saw?

A. Driven by and never been in it. Mines generally are pretty much alike in the Clearfield Region.

Q. They are all pretty well alike?

A. Yes.

Q. You mean to say—

A. I mean to say that the operation of the men working is pretty much the same.

Q. Were you ever concerned in the mine of Rainey?

A. No.

Q. Were you ever in the mine at Hoffsdale?

A. No.

Q. At Osceola?

A. No.

Q. You were concerned in a mine in Coalport, were you not?

A. Yes.

Q. That was a different vein of coal?

A. I do not know. I think it was.

Q. And you have not had a mine—

A. I imagine the heart of the coal was pretty much the same.

Q. That is imagination on your part. Are you going to swear to it?

A. I do not know for certain.

Q. Will you swear that the height of vein in your Coalport mine was nearly as high as the height in the Minds mine?

A. I will not, because of the fact that I only know of the height in the mines that are operated by Mr. Minds by report. I do not know of them of my own knowledge. Otherwise I would.

Q. If you know of your own knowledge you would, but you do not know of your own knowledge and you cannot?

A. I only know because I am told so, by reputation.

Q. Were you ever concerned in a mine up there that worked the same vein as Webster No. 4 in Coalport?

A. I am not sure whether we worked the D vein or the B vein at Rainey.

Q. You do not know whether you were interested in the same mine or worked the same mine?

A. I was not interested in any mine that worked the same vein.

MR. BIKLE: We offer in evidence an exhibit offered by these complainants before the Interstate Commerce Commission in these proceedings and duly certified by the Interstate Commerce Commission, being an exhibit showing distribution in the Tyrone division.

MR. GLEASON: We object to the offer of any detached part of the record from the Interstate Commerce Commission in this case, and we object to the particular sheet in question for the reason that there was considerable testimony with reference to the sheet offered before the Commission, and as embodied in the entire record of the Interstate Commerce Commission; thirdly, that the offer is an unfair offer for the reason that a garbled part of the report of the Commission is purported to be introduced here for the purpose of discrediting the finding of the Commission and forms no intelligent basis for the consideration of any criticism of the Commission at the hands of this jury.

MR. BIKLE: If the Court please, we think this is relevant for several reasons—

THE COURT: The only basis upon which it is evidential is that it is a declaration by the parties in interest?

MR. BIKLE: That is it, and it is admitted by the other side.

THE COURT: It is admitted on that ground.

Exception noted for plaintiffs by direction of the Court.

EDMUND C. HALEY, sworn.

By MR. BIKLE:

Q. You are in the employ of the Pennsylvania Railroad Company?

A. Yes.

Q. And have been for how long?

A. Thirty years.

Q. In what capacity?

A. As a clerk in the office of the General Superintendent of Transportation.

Q. What does your position involve in the way of duties, with respect to distribution of cars, anything?

A. I have charge of the rating of bituminous coal mines and keeping the record of distribution of cars.

Q. It is actually part of your duties to keep the records of that distribution?

A. To file the records of distribution, yes.

Q. Do you have here in court the records of the distribution of cars on the Tyrone Division of the Pennsylvania Railroad for the years from October, 1904, to June 30th, 1907, inclusive?

A. Inclusive, yes.

Q. Are you familiar with the defendant's exhibit No. 1, a blue print?

A. Yes, I have seen that.

Q. Do you know from what that blue print was prepared?

A. Yes.

MR. GLEASON: We forego the right of cross-examination of the witness on this point just at this time.

By MR. BIKLE:

Q. From what was this prepared?

MR. GLEASON: The question is objected to as incompetent, irrelevant and immaterial, and we desire the defendant to state the purpose.

MR. BIKLE: We are going to lead to the offer of the distribution sheets, the railroad company's distribution sheets, showing the distribution of the cars in this region, for the purpose of showing that in its determination of the additional tonnage

which the plaintiff might have mined and shipped, the Commission has made a mistake in calculating the number of cars which it should receive.

THE COURT: You would have to show that independently. The only evidentiary principle upon which this is admitted is that it is a declaration, a statement of fact, by a party in interest. They have made that statement. Supposing they did get it from some books of yours, that would not make your own statements evidential.

MR. BIKLE: We desire to introduce those sheets as substantive evidence of the cars available for distribution.

THE COURT: You will have to establish their evidentiary character independently of this.

MR. BIKLE: But they themselves have, by their presentation of a blue print in this proceeding, admitted—

THE COURT: Supposing they got some information from you, a statement or a book. Of course there is no fact—it is purely for the purposes of illustration, and on the basis of that, they made a statement. Having made the statement, why of course that is evidential against them, but supposing it was mistaken, it would not make a record from which they got it, evidence.

MR. BIKLE: I think it will authenticate it. We submit certain genuine documents—

THE COURT: The document is in evidence, and whatever they admitted, it becomes evidence. If they were led into a mistake, they can explain that fact.

MR. BIKLE: I think so, but I thought that *prima facie* this constitutes not merely an admission, as it is tabulated, but it constitutes an admission of the genuineness of the documents from

which it is compiled. They cannot come in here and dispute the authenticity of documents that they have offered in this proceeding.

THE COURT: Whatever admissions they made, they are evidence against them and are to be taken until we hear something else. They are to be taken as a fact, because when a man tells us something we take it for granted he is telling us the truth. If he is mistaken, misled in what he said, then he can explain that.

MR. BIKLE: But your Honor, this is a tabulation in lieu of the sheets. This is for convenient reference. They are in evidence.

THE COURT: Supposing the tabulation is incorrect. The tabulation of things they wrote down is evidence against them. Why? Because they wrote them down, but that does not make anybody else's writing down evidential. I cannot see on what principle it does.

By MR. BIKLE:

Q. You have in court the original sheets that are in your file in your office?

A. Yes.

Q. Covering the period from October, 1904, to June, 1907, inclusive?

A. Yes.

Q. Are they the official sheets of the company?

A. Yes.

MR. GLEASON: Please state your purpose.

MR. BIKLE: For the purpose of authenticating these sheets, in order to offer them in evidence.

THE COURT: That is to say, it is your purpose to show the number of cars which were supplied and the facts upon which the proper quota of cars could be determined by a calculation?

MR. BIKLE: Yes. It is the same evidence which was admitted at the other trial, precisely.

MR. GLEASON: That I should absolutely object to. It is not admitted in the same manner at all.

THE COURT: We are not up to the question of the sheets yet, but we are on the question of what the objection is to their proving—and that is one of the things this jury wants to know the data upon which the damages are to be calculated. How can you determine the data unless you know the car shortage, and how can you know the car shortage unless you know the facts from which the car shortage can be determined?

MR. ROADS: Our desire was to get the offer from the defendants and then object to it.

THE COURT: What they propose to show is now the record of the cars furnished, the cars which were actually furnished, for the purpose of having determined the data upon which the judgment of this jury will proceed, as to how many they should have supplied to your minds.

MR. ROADS: We object to that testimony if it goes to impair this sheet, which was offered in evidence and is part of the record upon which the Interstate Commerce Commission based its finding. The sheet was prepared at the instance of the Commission, by comparison, and submitted to counsel on both sides, and admitted in evidence and comes from the books of the defendant company. The point we make is that they cannot attack that sheet on the ground that they are estopped after having made up the sheet that was prepared and sent in and submitted to the Commission. They cannot now put this witness upon the stand and show something—

THE COURT: Are we not approaching it from

the wrong angle? We are not attacking anything or anybody. We are trying to find out certain facts, and we are trying to find out what the truth is. The fact that somebody else has made a similar investigation—whatever they thought they found they thought they found, but what we think we find, we are going to think we find.

MR. ROADS: We have no contention against that. Our contention lies in this point, that they ought not to be permitted on the ground of estoppel, to offer in evidence before this court and jury anything that would contradict this sheet, because it would be unfair to the Commission who made this award upon which we stand; and secondly—

THE COURT: What interest have the Commission in it? They have no more interest in it than this jury or I have.

MR. ROADS: It affects us through the award by offering this at this time, and your Honor will catch my meaning when I say that we have no objection to this witness testifying from this sheet any deductions he may choose to make, but if he undertakes to show anything different than is on this sheet that has just now been offered by the defendant, we object to that as they are being estopped, on the ground of estoppel.

THE COURT: If I have caught the theory of your case, it is, first, that you were entitled first to a certain number of cars; that you did not get all you were entitled to; that by reason of that you could not ship, and therefore could not sell as much coal as you had otherwise shipped and sold, and that your second damage is the loss in what you would have made on that coal had you shipped.

The first thing this jury will have to know is how many cars were you short? How many tons would those cars have carried? What would it have

cost to have shipped that coal, and how much would you have received for it if you had shipped it? Given that data, they will figure out the amount of damages.

MR. ROADS: That is all in the findings of the Commission.

THE COURT: As I understand, what they are proposing to show by this witness is the facts from which the extent of the car shortage can be determined. Is that correct?

MR. BIKLE: That is right.

THE COURT: What is your objection to showing that?

MR. ROADS: On the ground that they cannot be summoned before the tribunal to determine and offer any such—

THE COURT: Is that an administrative question? If it is, we are concluded by the finding of the Interstate Commerce Commission. If it is a question of fact the people of the United States have said that juries are to find facts, and not Commissions or lawyers or judges or anybody else, but juries, and that is what this jury is for, to find the facts, and that is one of them.

MR. ROADS: Is it not an administrative fact?

THE COURT: If this is an administrative finding, it is just as much the law of this case as if it was written into an act of Congress, and we take it because it is the law. It is not the fact, it is the law, but how the number of cars that were furnished to you can be said to be an administrative question, I do not quite grasp.

MR. ROADS: I do not know what the purpose is, whether it is to affect the damages alone, or whether it is to affect the discrimination.

THE COURT: You asked them to state what they propose to prove. They have stated what they propose to prove is what the real shortage in your cars was, if any. For instance, supposing they were able to establish to the satisfaction of everybody that there had been no car shortage at all. You would not have any claim for damages against them, would you?

MR. ROADS: Whether the jury believed the Interstate Commerce Commission finding or not, the findings of the Interstate Commerce Commission are here fixed in this case. Then if they could show to the satisfaction of the jury—

THE COURT: Do you understand that the finding of the Interstate Commerce Commission on facts concludes anybody? It is merely *prima facie.*

MR. ROADS: Merely *prima facie.*

THE COURT: It merely relieves you of the necessity of proving the thing over again. You have done that.

MR. ROADS: Yes.

THE COURT: We take that as *prima facie* evidence. That is to say, that is true until we are convinced that it is not true. That is what they are proposing to do.

MR. ROADS: We have no fault with that at all. The point I am making is this. I think, if the Court please, and I submit, that the rule of law applies here in regard to these sheets just exactly as it applies in any suit or any other question where a man is estopped from making any contention on the thing which he has done. If he makes a representation in the course of the matter, that is pertinent.

THE COURT: I understand it is your compilation.

MR. ROADS: It is a compilation offered in evidence by agreement of counsel from their own books. The question is, are they to be permitted to undermine this?

THE COURT: Is it not your compilation?

MR. GLEASON: No.

MR. BIKLE: It is, so certified.

THE COURT: If it is not, it is admitted on the wrong statement of fact. I asked for that statement, and it was admitted as your declaration of a fact, and because it is your declaration of fact, evidence against you. Notwithstanding you said it, it might not have been true. You might have made a mistake. You might have gathered it from sources that were not reliable. Because you said it, it is evidence against you, and because you said it we can believe that it is true until you or someone explains wherein it is not true. You may have said something that was inaccurate. We all do.

MR. ROADS: No, we stand by the sheet, but did your Honor catch the remark that I made, the statement I made, as to how this paper was prepared?

THE COURT: Yes, I caught the remark, but I caught it as a remark. There is not anything yet in evidence that shows me how it was made.

MR. ROADS: It was made in this way, at the suggestion of the Examiner representing the Interstate Commerce Commission. It was stated that both sides get together in the office of the Pennsylvania Railroad Company in Philadelphia and from their records compile a statement of car distribution, and the original of this is the result of that suggestion, offered in evidence and received in evidence and acted upon by the Interstate Commerce Commission. The doctrine of estoppel should apply to them provided they attempt to undermine that sheet.

THE COURT: If they agree to something, they are of course bound by their agreement.

MR. ROADS: That is it.

THE COURT: If they agree to something you will have to produce evidence of the agreement. I cannot assume they have agreed to something.

MR. GOWEN: I have no doubt Mr. Roads believes what he is saying is the truth. What we agreed to do was this: The Examiner of the Commission asked—we submitted our distribution sheets to these gentlemen in order that they might prepare a statement from them. That was a fair request. We had not a thing to do with the tabulation of those figures. They were made by their own people and we did not take any part in it at all.

MR. MOORE: You furnished the distribution sheets for our men to make that?

MR. GOWEN: Yes.

MR. MOORE: We furnished you a copy of that blue print in advance of the arguments before the Interstate Commerce Commission.

MR. GOWEN: Yes.

MR. MOORE: You never raised any objection; it was argued on that blue print?

MR. GOWEN: It was argued, but the argument distinctly questioned the accuracy of your figures.

MR. MOORE: You questioned that blue print?

MR. GOWEN: Oh, yes.

MR. MOORE: Does the record show that?

MR. GOWEN: We certainly did it.

By MR. BIKLE:

Q. These distribution sheets are the official copies of the distribution sheets on file in your office?

A. Yes.
Q. The originals?
A. Yes.
Q. What do they show?

Objected to.

THE COURT: You can show the purpose for which they are kept, of course.

Q. For what purpose are they kept?
A. For the purpose of making a record showing the cars placed in each mine in the Tyrone region.
Q. Are they for the purpose of showing the distribution generally in the region?
A. Yes.

MR. BIKLE: We offer those in evidence.

THE COURT: The witness is subject to cross-examination.

Q. These sheets are sealed?
A. Yes.
Q. When was that done?
A. I think it was about last April.
Q. What was the occasion for sealing them?
A. We had a firm of accountants take off some additional information and when they were through the chief said, "Seal them", so we would have no further access to them.
Q. So they have remained sealed ever since?
A. Yes, the accountants examined them this morning.

By MR. GLEASON:

Q. When were they examined?
A. By these accountants?
Q. Yes.
A. Somewhere between February and May this year.
Q. Where?
A. In the office of these accountants, in the Commercial Trust Building.

Q. So they were taken from your office?

A. Yes.

Q. Where is your office?

A. On the third floor, Broad Street Station.

Q. And they were taken to the office of a trust company, office of accountants?

A. Yes.

Q. Where is that office?

A. That is on the 12th floor of the Commercial Trust Company.

Q. What city?

A. Philadelphia.

Q. How long did they remain with those accountants?

A. I cannot tell you just the exact period; somewhere—anywhere from one week to four.

Q. These were sealed then by the accountants?

A. Yes.

Q. And they were brought back to you?

A. Yes.

Q. You did not know what is in them?

A. They were brought back to us. We tied them up.

Q. I am asking you if you are willing to swear what is in these papers?

A. Yes.

Q. Have you opened them?

A. The accountants brought them back in a loose state, and we tied them up in their presence and they sealed them in our presence.

Q. The accountants brought these back in a loose shape?

A. Yes.

Q. And then you put them together?

A. Yes, put them in these bundles, yes.

Q. And you sealed them up?

A. Yes, sealed them.

Q. Did you examine to see whether there had been any changes made by the accountants?

A. We did not examine each individual sheet. We saw that the months were there.

Q. And made no particular examination except that at all?

A. Not as to the sheets, no.

MR. GLEASON: We object to the introduction in evidence of the sheets.

By MR. GLEASON:

Q. Where did you get the information from which these sheets were compiled?

A. Those sheets are made by the car distributor in the region.

Q. They were not made out by you at all?

A. No.

Q. Where does he get his information?

A. He gets his information from reports made by train conductors, placing the cars to different mines.

Q. These different train conductors on the different divisions, make their report of the cars to what source?

A. They make it to the trainmaster.

Q. To whom does the trainmaster make his report?

A. The car distributor mostly works in the trainmaster's office.

Q. And he makes his report to the car distributor, does he?

A. Yes, that information is turned over to him.

Q. And then that report is made to you?

A. Yes.

Q. It passes through four or five hands before you get it?

A. After the car distributor makes it out, he sends it direct to our office.

Q. Where are the records from which these were compiled, the original records?

A. You mean the train conductor's reports?

Q. Yes, and the trainmaster's report, and the car distributor's report, where are they?

A. They would be on the Tyrone Division, in the local office.

Q. They could be produced here?

A. Yes.

MR. GLEASON: We object to the offer of the distribution sheets as not being the best evidence and the original foundation, and merely depending for identification by the witness upon the stand, as hearsay testimony absolutely, not the best evidence in the case.

THE COURT: Do you want to develop the facts a little more clearly? I understand the basis of that objection is that they are not the original entry, that they are the ledger entries of the books of original entry.

MR. BIKLE: It is the only practicable way of course to show the data.

THE COURT: You show that and dispose of it as a practicable question.

By MR. BIKLE:

Q. These reports that you have alluded to, by which these sheets are made up, about how many would there be in a day for example coming into the car distributor from this division?

A. A train would serve probably 20 mines. There are about 140 mines on the sheet.

Q. These reports from each train are sent where?

A. To the trainmaster.

Q. What do they show, each one, what information is contained on them?

A. They show how many cars are set forth at each mine.

Q. What does the trainmaster do with that report?

A. He turns it over to his car distributor.

Q. Is that the basis on which these sheets are made?

A. Yes.

Q. If you had all those trainmaster's reports, would they show an intelligible statement of the distribution?

A. No, sir; they would have to be worked out on a sheet, just like that, in order to get a true idea of the distribution in the region; you would have to boil it down to a whole some way or other.

By THE COURT:

Q. What is done with them when they come in; these sheets are really tabulated then as I understand; what has become of them, are they kept?

A. They are kept for a certain length of time. I don't know how long.

Q. How about those as far back as 1902, 14 years ago; are they kept?

A. I think the I. C. C. only refers that they keep them 7 or 8 years.

Q. What I want to know is the fact, can they be produced?

A. I couldn't tell you.

THE COURT: I suppose that that is insisted upon as the basis of objection. I will give you an opportunity to show whether they can be produced or not.

MR. BIKLE: I was considering whether to make a formal offer of the sheets as they are linked up with this blue print, so as to get the exception on the record.

MR. MINDS: If your Honor please, we are perfectly willing to let them offer this thing in evidence if they will offer the record of the whole case before the Interstate Commerce Commission. We object to sending in a little piecemeal of the case—

THE COURT: What difference does it make whether they offer it or whether you offer it? We

are trying this case absolute *de novo*. This jury is trying it just as if the same case had been previously before another jury. That jury would have disposed of it to the best of their judgment and ability, and this jury will dispose of it to the best of its judgment and ability, and it is not attacking anybody.

MR. MINDS: They come here and present a piece of paper out of a record that has probably five hundred pieces of paper.

THE COURT: If there is any part of this record that is an integral part of the statement submitted of the record, it would have to go in. They cannot offer half of what you said, but of course they must offer the whole of it; but if you said some one thing at one time and something else about another thing at another time, they can offer all you said about the one thing without being called on to offer all you said about other things. But they cannot offer a part of a thing which they are offering. They must offer the whole of that, just the same as if it were any statement you made. They could not offer a part of a statement you made without offering the whole statement; but if you made a statement on one subject and a statement on another subject, they could offer one without offering the other.

MR. BIKLE: We have no objection to the whole record going in evidence, but there is nothing in it that we want to exclude except that.

THE COURT: Suppose you stipulate then this, that either of you may offer any part of that record which you choose to offer without objection.

MR. BIKLE: And that is on a statement of counsel on the other side that these sheets are accepted without going beyond what has been done.

MR. MINDS: They have the record to produce, I believe?

MR. BIKLE: Yes, we have it here, certified.

THE COURT: You make this offer and make the stipulation upon which they refrain from objecting to it.

MR. GLEASON: Our objection is withdrawn with the understanding of course that either side is at liberty to introduce the whole record or any part of it without objection.

THE COURT: Let it be admitted on that condition.

MR. GLEASON: The objection to the document offered in evidence as not being the original, but a copy, is withdrawn. Our objection to the admissibility of the sheets themselves as being distribution sheets is withdrawn. We maintain that part of the objection as against their use of these distribution sheets to attack the blue print in question. In other words we take this as their declaration before the Commission, and while your Honor said that this was *de novo*, your Honor did not surely mean that we could get an increased amount over the award the Commission gave us. Our status is fixed by the award of this Commission. We come in here under that award. We cannot make any attempt in this court to get a dollar more, no matter what our claim was before the Commission. We cannot make any attempt before this court to get a dollar more than the award which the Interstate Commerce Commission gives us.

THE COURT: The reason of that is your suit is on the order.

MR. GLEASON: It is on the order,, and it is the only thing we could do. If our position is fixed in

that way, there is surely some limitation to their offer of evidence to contradict testimony that was offered before that Interstate Commerce Commission. They had their day in court. They had more than one day in court. This sheet was produced by them and they allowed this Commission to go on, make all its calculations, make its award, upon that paper that was furnished from their record, and now we are bound by the findings of that Commission. Does not the doctrine of estoppel apply somewhere?

THE COURT: I am afraid I do not quite grasp that phrase as applied to this. As to the estoppel proposition, it would seem it would really mean that the finding was conclusive.

MR. GLEASON: No, your Honor, but we are bound by the finding of the Commission, are we not, in this case? Absolutely. We cannot get one cent more.

THE COURT: I do not think you are bound by it, but your claim is based on it. In that sense you may say you are bound by it, but you—

MR. GLEASON: As we stand here today we are bound by it.

THE COURT: You are bound by it in the sense in which your house cannot very safely be bigger than your foundation.

MR. GLEASON: If a certain item of evidence was introduced before that Commission from their books and plainly indicating what their books show, can it be possible they can introduce a witness here now to show something that their own books did not show?

THE COURT: Supposing they had called a witness who would testify to a certain state of

facts, testify with perfect truthfulness as far as his intentions to tell the truth are concerned, and in perfect good faith. Now on the basis of that the Commission makes an award, as they naturally would, basing their award on a finding which in turn was based on that testimony. The case comes to be resubmitted to a jury, and it turns out as a fact that that witness made a mistake and the fact was not as he testified to. He might be willing to take the stand himself and frankly acknowledge that he was in error, that he had failed to remember, or he had remembered wrongly, and he wanted to correct it. Is it your position that these people would be what you call estopped and could not show what the real truth was?

Mr. Gleason: Not in that particular instance which your Honor cites.

The Court: What is the difference between the witness taking the stand and saying it and the blue print showing it?

Mr. Gleason: We have got to introduce the findings of the Commission as our basis for recovery in this Court. We are bound absolutely by these findings and we have introduced them.

The Court: More than that, they are made evidence in your favor from which the jury can find.

Mr. Gleason: They are from the books of the Pennsylvania Railroad Company absolutely, and now that we are bound by that finding before that Commission, that they can come in here, and having had two opportunities before the Interstate Commerce Commission to develop this same matter, that they can start it in here now *de novo*, considering now that we are bound by the finding of that Commission, does not appear to us to be justice, it does not appear to us to be right.

THE COURT: It is not a question of what it should be, because neither the jury nor I wrote this Act of Congress, but it is, what is in the Act of Congress? What I understood was that you were in Court on the proposition that the jury was to determine the amount. The amount as found in your favor is evidence, offered in evidence. The jury can find that to be the amount—

MR. GLEASON: That is presumed to be the correct amount. We are bound by it.

THE COURT (reading): "Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the finding and order of the Commission shall be prima facie evidence of the facts therein stated," except that you may in addition to your damages recover certain special costs.

It seems to me that is perfectly plain and can have but one meaning.

MR. BIKLE: I think Mr. Gleason is stretching this blue print far beyond what appears on it. For instance, if, as your Honor has stated, there is a patent mathematical error, this Court is not going to accept that; on this blue print, of which they doubtless have a copy, there is shown for the quarter ending September 1906, that their rating was 832 cars and that they received 480, and yet they show that their percentage of distribution was only 23.4. Of course 480 is more than half of 832.

THE COURT: I do not understand that to be the basis of Mr. Gleason's objection. His basis is that he starts off with a proposition that if the Commission had allowed them only half of their claim they could not have shown that they were entitled to more and received the full amount of

the claim; ergo, they are bound by it, and if they are bound by it you are bound by it—

MR. GLEASON: Not altogether.

MR. BIKLE: The further thing is that this blue print does not even purport to show what would be the cars properly allottable under the Commission's rule of distribution. When this case was pending before the Commission one of the disputes was, What was to be the proper rule of distribution? This blue print does not even purport to show what the mine here in question was entitled to under the Commission's rule of distribution, and of course what we have to consider in this case is, What cars would these people have had, not on the rule we had in effect, not on the rule these plaintiffs might contend for, but on the rule the Commission found, and that was the administrative feature, and this blue print does not purport to cover that fact. I think your Honor is perfectly right, that we are trying a question of shortage of cars based on discrimination. There are certain findings which have enabled these gentlemen to make out a prima facie case, but it is a question whether they are correct.

MR. GLEASON: On the administrative feature the Commission found of course—I think that is conceded in this case—that the policy of car distribution, with their assigned and unassigned cars, was unjust and discriminatory. I do not believe they will try to get away from that. The Commission did find that substantially as an administrative feature, but we contend that they have offered certain evidence here, and they joined in the offer of certain evidence, taken from their books. The matter which was reduced to that paper is exclusively in their possession, and we have to go to their books and find it, and to come in to Court

and say that is a replica, a copy of our book, and not after having deceived the Commission, they propose to come in here with the sheets—

MR. BIKLE: That is not true.

MR. GLEASON: That is the way it looks—they propose to come in here with the distribution sheets from that region and throw into this case something they did not submit to the Commission, upon a record made from their books, and supplemented by the testimony of a witness.

THE COURT: Was not this blue print you speak of offered by you, and did you not gather the information from which that compilation was made from the distribution sheets that they supplied?

MR. GLEASON: It is a joint offer.

MR. BIKLE: That is not what the certificate of the Commission says.

MR. GLEASON: We will go into that further in the morning. We have got to take time to go over the entire testimony, but it was a joint offer and was compiled from their books. How could it be our exhibit when we had to go right down to their books to get it? It was introduced for all purposes in the case. It was the thing the gentlemen of the Commission absolutely relied upon. It is the thing we are bound to rely upon, because they were compelled to rely upon it, and now to shift the rule of evidence, that because the Commission was bound to rely upon this, and that we are bound to rely upon it, now that they can introduce a new standard and supplement this, which was taken from their own books, and Mr. Bikle knows that that is the form that they always get it from their own books, and the technical construction of trying to appeal to that, is simply

technicality and is not fair. He knows that every distribution sheet that comes from that railroad company is made in that form.

MR. GOWEN: Mr. Bikle was not concerned in the matter at the time this blue print was prepared. I do not know whether Mr. Gleason was or not, but he has not stated the facts.

MR. GLEASON: Did you not use that very same blue print as a matter of convenience for the Chestnut Hill case?

THE COURT: Are you through with this witness?

MR. GLEASON: We withdrew the objections, as I recollect.

THE COURT: The ruling was that the paper was admitted upon compliance with the stipulation into which counsel had entered. If that stipulation is not made it is out of evidence. If it is made it is in evidence.

If you want to add anything to that it is your privilege to add it.

MR. GLEASON: The only thing we added was that we objected to the distribution sheets being used to contradict the draft, the blue draft, the exhibit.

So far as our objection concerns the admissibility of this, and the question of identity, we have withdrawn that.

Objection overruled. Exception noted for plaintiffs by direction of the Court.

MR. GLEASON: May I add in addition to what I have already said, that our objection is that the exhibit offered is only a part of the original record.

THE COURT: There must be more basis for

that than a statement. If it is offered as an entirety in itself, not as the whole record, but as an entire exhibit of the record—

MR. GLEASON: Your Honor has overruled that objection.

THE COURT: No, I sustain the objection unless it is an entirety in itself. They cannot offer a part of some statement you made without offering the whole of the statement.

MR. GLEASON: I understand we are at liberty to offer the—

THE COURT: You are at liberty, either side, to offer anything that is contained in that record.

MR. BIKLE: If Mr. Gleason wants to offer any evidence in conjunction with that, that is not an entirety, it can go in now.

THE COURT: It is admitted with the understanding that it is an entire offer in itself. If anything is discovered that should go in with it as part of it, that may be offered without objection.

H. H. TWOSE, having been duly sworn, was examined and testified as follows:

By MR. BIKLE:

Q. What is your occupation?

A. Accountant.

Q. With what firm are you employed?

A. Price, Waterhouse and Company.

Q. How long have you been an accountant?

A. I have been an accountant for several years. I have been with Price, Waterhouse & Company for the last three years.

Q. Were you employed by the Pennsylvania Railroad Company to make an examination of the distribution sheets of the Tyrone region on this line for a period from October, 1904, to June, 1907, inclusive?

A. I was.

Q. When did that take place, in a general way?

A. It was during April and May of this year.

Q. What sheets did you examine?

A. The car distribution sheets which are here on the table.

Q. How do you know you examined those particular ones?

A. Before Mr. Haley brought them over here I examined the seals which we placed on them in Mr. Haley's presence some time during May of this year.

Q. Those seals were unbroken?

A. Those seals were unbroken when I examined them over here.

By Mr. Gleason:

Q. You state that these are sealed in the same manner now as they were when you left them?

A. Yes.

Q. Did you hear Mr. Haley testify that they had gathered them together and put them in that shape?

A. I could not hear what Mr. Haley was saying.

Q. If he did testify that those sheets were gathered together and put in that shape and sealed, then you are mistaken, are you not?

A. No.

Q. If you did that after they were returned to him, then you are mistaken?

A. I am not mistaken. We went over to the Pennsylvania Railroad offices, took those sheets over there and both of us assisting, Mr. Haley and I, the sheets were put in the package and sealed by me and my assistant.

Q. That is they were loose when you and Mr. Haley put them in there?

A. They were bound together, month by month.

Q. They were not loose then?

A. No.

Q. And Mr. Haley and you then put them in these

packages and sealed them up, is that your statement of it?

A. Exactly.

Q. What position do you occupy?

A. I am an accountant.

Q. How many men worked on this job?

A. On this particular region, Mr. Ballingaugh and myself only.

Q. Are all the figures and the writing either in your hand or his?

A. None of the writing on these sheets is in mine.

Q. These are the railroad sheets?

A. These are the railroad sheets.

By Mr. Bikle:

Q. Did you have also in connection with your work this blue print already offered and received in evidence as Defendant's Exhibit No. 1?

A. I did.

By Mr. Gleason:

Q. How do you know you had, is there any mark on that paper by which you identify that as the paper you had in your possession?

A. I remember these ink spots for one thing (indicating on exhibit).

Q. And that is all you recollect.

A. No, I can easily prove that these are the figures by the records which I took from them.

Q. But before you can prove that you can identify this as being the exact sheet, before you do prove that you identify this as being the exact sheet?

A. That looks extremely like it.

Q. Is it proposed by your testimony to change any figures that are on this blue print; you know the result of that—

A. Yes.

Q. Is it proposed by the account you have made up here to change some result on this blue print?

A. Yes.

MR. GLEASON: We object to any testimony from the witness on the stand that will change or alter the figures on the blue print marked Defendant's Exhibit 1.

THE COURT: That is on the ground, as I understand you, that they cannot vary the evidence upon which the Commission made its findings?

MR. GLEASON: It is incompetent, irrelevant and immaterial, being matter that was submitted to the Commission upon which it made its findings, as a basis upon which the Commission had to act, taken from the books of the railroad company; that they cannot now bring in an outside witness to change the face of that record upon which the Commission relied, and because we are bound by the reliance of the Commission upon the fundamental fact that lies before the witness.

Objection overruled. Exception noted for plaintiffs by direction of the Court.

By MR. BIKLE:

Q. You have also had before you the Commission's opinion giving the amount of additional tonnage which, under an additional car supply, might have been shipped?

A. Yes.

The Court adjourned until Tuesday, October 10, 1916, at 10 o'clock.

Philadelphia, Tuesday, October 10, 1916, 10 a. m.

Present: Parties as before noted.

Direct-examination of H. H. Twose resumed.

By MR. BIKLE:

Q. Mr. Twose, you testified yesterday afternoon, as I recall, that in making your examination you had

before you the distribution sheets, the report of the Interstate Commerce Commission upon the case, and the blue print which has been offered in evidence as Defendant's Exhibit No. 1. Is that correct?

A. That is correct.

Q. Do you know what the Commission found to be the fair rating of the plaintiff's mine?

A. Five hundred and sixty tons per day.

THE COURT: I suppose the fair rating means that the fair and reasonable business expectation is that if they were fully supplied with cars their output would amount to that much? Is that the idea?

MR. BIKLE: I think that is a fair description, your Honor.

THE COURT: We will understand it in that way, then, that if they had all the cars which they could use, then their mine equipment was such that they could ship that many tons per day?

MR. BIKLE: That is right.

By MR. BIKLE:

Q. What did the Commission find would be the fair number of days per month the mine could have worked?

A. Twenty-two.

Q. How many months are included in the first period of this case, extending from June 1, 1902, to October 1, 1904?

A. Twenty-seven months.

Q. What would the aggregate tonnage be for that period if there was a full supply for every working day?

A. 332,640 tons.

Q. What did the Commission find would have been the output with the cars to which the Commission found they would have been entitled?

A. In this first period?

Q. Yes.

A. 120,415.68 tons.

Q. What percentage is that of the full possible output of the mines with the supply of cars as first indicated?

A. 36.2 per cent.

Q. Is there anything on the blue print which corresponds with that figure?

A. Yes, sir.

Q. What is it?

A. If you take the quarterly percentages shown on the blue print for the nine quarters of that period —that is, the percentage of cars available for distribution to the regional rating—take those nine percentages and add them together and divide by nine, you arrive at your percentage, which I mentioned before, of 36.2.

Q. That is the average, then?

A. That is the average.

Q. Of those percentages?

A. Of those percentages.

Q. And those percentages are the percentages that are found in the eleventh column of the blue print?

A. Yes, sir.

Q. How is that column headed on the blue print?

A. "Per cent. based on division rating."

Q. During the second period, extending from October 1, 1904, to June 30, 1907, the Commission's statement as to the fair rating and the number of working days remain the same?

A. It does remain the same.

Q. How many months are there in that period?

A. Thirty-three months.

Q. What would be the total tonnage with a full output for every working day?

A. 406,560 tons.

By The Court:

Q. So we can follow your testimony, Mr. Twose,

as we go along, that merely means that taking thirty-three months, twenty-two days in each month, and an output of 560 tons a day, and making a calculation from those three bases, you get the result 406,560 tons?

A. Exactly.

By Mr. Bikle:

Q. What did the Commission find would have been the output with the share of cars to which the Commission found this mine entitled in this second period?

A. 214,257.12 tons.

Q. What percentage is that of the full output which would have been made if they had mined 560 tons for twenty-two days in the thirty-three months?

A. 52.7 per cent.

Q. Does that percentage correspond to anything on the blue print?

A. It corresponds to the column to which I referred "Per cent. based on division rating," for the ten quarters of the period in question. Add those ten percentages together and divide by ten, and you arrive at this percentage., average percentage, of 52.7 per cent.

By The Court:

Q. Won't you explain right there, in the same way in which you did as to the 332,640 tons and the 406,560 tons, how the other figures of 120,415.68 and the 214,-257.12 were reached?

A. If you take the 332,640 tons for the first period and find the 36.2 per cent. of it you will arrive at the Commission's award, or the figure arrived at in the Commission's award of 120,415.68 tons.

Q. In other words, that is in the one case 36.2 per cent. and in the other 52.7 per cent. of that first utmost output of the mine?

A. Exactly.

By Mr. Bikle:

Q. You have stated that in this second period from

October 1, 1904, to June 30, 1907, there were how many months?

A. Thirty-three months.

Q. What does the blue print show with respect to the distribution during that period? Was there a distribution during the whole period?

A. No, sir. During that period there were four months in which there was no distribution to any of the mines in the region, as shown by the blue print.

Q. Has any deduction been made in this calculation on account of those months?

A. None whatever.

Q. The percentages to which you have alluded as in the eleventh column, and which are entitled "Per cent. based on division rating," are calculated with respect to what figures as appears on the blue print?

A. They are calculated with respect to the division rating for the month and the cars for distribution.

Q. Irrespective of their character?

A. Irrespective of their character.

Q. That is to say, all the cars distributed are added and the figure in that column represents the percentage relation which they sustain to the total rating for the region?

A. Exactly.

Q. What are the cars shown separately in those columns? How are they described?

A. They are described as "P. R. R.," "Individual" and "Foreign."

Q. In making your examination of the distribution sheets what were you requested to do by our company in making up the statement?

A. I was requested to make a list of such mines as received foreign fuel supply, company coal and individual cars in excess of those mines' rating for the month. That is, we were to take the percentage of cars available for distribution in the region for the month, find that percentage, and then after taking the indi-

vidual, foreign fuel and company coal cars they received in excess of their percentage of rating, to eliminate those cars and their rating from the total rating and from the cars available for distribution.

Q. When you speak of eliminating cars, what kind of cars do you refer to?

A. I refer simply to the foreign fuel, company coal, and individual cars.

Q. What is a foreign fuel car?

A. It is a car which has been sent to the region assigned, or consigned, to some particular mine by some railroad company other than the Pennsylvania Railroad Company for the purposes of sending fuel to the railroad company which has purchased it.

Q. What do you mean by a company supply car?

A. I refer there to the Pennsylvania Railroad cars which have been sent to the mine for coal which has been purchased by the Pennsylvania Railroad Company from the mine to which the car has been sent.

Q. What do you mean by individual cars?

A. I refer there to the private cars of the mines themselves.

By THE COURT:

Q. As I understand it, what you start off with is the rating of the region?

A. Yes, sir. If I may explain it in this way: Each mine has a rating——

Q. We have had that explained, and as far as this mine is concerned its rating, on the basis of it having all the shipping facilities which it could use and employing all its mining facilities to the utmost, we get a rating for this mine of 560 tons?

A. Yes, sir. Add the total ratings of all the mines in the region, and then you come to the division or regional rating.

Q. If you take in that same way the rating of the whole region you can get the proportion which this mine bears to the whole region? Is that it?

A. That is not the percentage I was referring to. The percentage I was referring to was that on any given day we will suppose that the rating of the region would be 20,000 cars, or any given month, and all the cars available for that distribution, available for distribution in the region for that same period will be 10,000. Then the percentage of the regional rating would be 50 per cent., and each mine would be entitled to receive 50 per cent. of its rating.

By Mr. Bikle:

Q. The regional rating is the aggregate of the ratings of the mines in the region?

A. All the mines in the region, yes.

By The Court:

Q. As to these cars, of the cars that are available for the purpose of the shipping of coal, some of them may belong to the mine operators themselves? That is one class?

A. That is one class.

Q. What do you call that class, the class of cars which belong to the different mine operators, their own private cars? What do you call them?

A. Private cars or individual cars.

Q. Then, we know them as private or individual cars. Now, I gather from you that cars may be used not for the purpose of shipping commercial coal, but for the purpose of shipping coal to different railroads to be used as fuel in the operation of those railroads?

A. Exactly.

Q. What do you call that class?

A. When they are not for the Pennsylvania Railroad they are called foreign fuel cars.

Q. That is to say, if one road—we will say the Baltimore and Ohio—wants coal shipped to it for its own fuel purposes and uses the cars belonging to some other road for that purpose, is that what you call the foreign?

A. If they send cars, whether their own cars or any other cars that are sent to that region for their own coal, then we would call those foreign cars.

Q. Whether they belong to them or whether they do not?

A. Yes, sir.

Q. Is there any other class of cars to which your calculation refers other than those two?

A. The company coal cars I have referred to, which would be cars which the Pennsylvania Railroad had sent to a mine to get coal to fill contracts which they had with the mine, to be used for their own purposes as fuel.

Q. Does that classification include all the classifications of cars which enter into your calculation?

A. Then, in addition to that there are the cars which are not consigned or assigned in the manner mentioned, and which still remain as cars available for distribution amongst all the mines in the region which have not received an excess in the manner indicated over their rating, over their percentage rating.

By Mr. Bikle:

Q. That is the ordinary car for general commercial use?

A. Yes, sir.

By The Court:

Q. So we get that, what that means is all the cars that are used for the purpose of shipping out coal to be distributed and sold to consumers?

A. Exactly.

Q. What we might call commercial coal, commercial shipments?

A. Yes, sir.

Q. Does that include all of the classes?

A. That includes all the classes.

By Mr. Bikle:

Q. Just one word about these foreign fuel cars.

They are cars which are sent by some foreign railroad specifically designated to the mine for its own coal?

A. Yes. That is what I meant when I said assigned or consigned to a particular mine.

Q. You have stated that you have eliminated from the statement that you have prepared mines which received more individual and fuel cars than their rating would have entitled them to?

A. Yes.

Q. And also the ratings of those mines?

A. Yes, sir.

Q. Have you eliminated any commercial cars which those mines may have received in addition to their individual and fuel cars?

A. No.

Q. Will you take, for example, the month of October, 1904, and explain in more detail how you have prepared your statement of the cars distributable in this region? That is, I mean before giving the figures specifically.

A. Do you wish me to state the mines which I have eliminated?

MR. BIKLE: Your Honor, just to make it clear, we are not attacking the Commission's finding in the period covered by what is known as the first action, from June 1, 1902, to October 1, 1904.

MR. GLEASON: So we understand that, in the first period this is not an attack on anything? I mean from July, 1902, to October, 1904.

MR. BIKLE: We are not attacking, with respect to the first period, anything that the Commission found with respect to the number of cars that you should have had. The percentage of difference is comparatively small. I mean they found only 9,000 tons. We are not attacking that.

MR. GLEASON: But your attack is directed to the second period?

MR. BIKLE: In this regard. Not as to other features of the case, but in this regard.

THE COURT: That means the cars to which they were entitled, to which the Commission found they were entitled?

MR. BIKLE: Yes, sir.

THE COURT: Then we can assume that they were entitled during that period to a certain distribution?

MR. BIKLE: We can assume, for the purposes of this case, that during the first period they were entitled to cars which would have enabled them to move in addition to what they did move nine thousand and some tons of coal.

By MR. BIKLE:

Q. Will you please proceed, Mr. Twose?

A. I have taken the region rating for cars for a month—that is, the total rating day by day—and added them together and got the total region rating for the month. This figure I may mention I have taken from the plaintiff's blue print.

By MR. GLEASON:

Q. What is that figure?

By MR. BIKLE:

Q. Give the figure.

A. 20,829 cars. That is, I have taken the total shown on the blue print and divided by twenty-five tons.

By MR. GLEASON:

Q. You have reduced the tons to cars?

A. I had to reduce it to cars to enable me to get a figure.

By THE COURT:

Q. How many cars?

A. 20,829.

By Mr. Gleason:

Q. What month is this?

A. October, 1904.

By Mr. Bikle:

Q. What is the next step?

A. Against that I placed the total cars placed.

Q. From where did you get that figure?

A. I got that from the blue print.

Q. What was that tonnage that you reduced to cars?

A. 520,725.

By Mr. Gleason:

Q. How many cars?

A. 20,829 cars.

By Mr. Bikle:

Q. You then ascertained the number of cars placed, you said, in the region?

A. I ascertained that from the blue print. The figure is 5,912.

Q. That again was ascertained from the blue print which has heretofore been offered in evidence?

A. Yes, sir.

Q. What did you ascertain from those two figures?

A. The per cent. of the region rating placed. That is, 28.38 per cent.

Q. What was the next examination you made? What did you seek to ascertain after you had found that 28.38 per cent.?

A. I sought to ascertain which mines in that region had received cars, individual, foreign fuel and company coal cars, in excess of their percentage that they were entitled to; in excess, in other words, of the 28.38 per cent. of their rating.

By Mr. Gleason:

Q. Just repeat that again, please.

A. I sought to ascertain the cars they had received,

fuel and individual and company coal, in excess of their rating, based on this 28.38 per cent. That is, if their rating were 100 cars on the basis of 28.38 per cent. available for distribution, they were entitled to receive 28.38 per cent. of a car.

By Mr. Bikle:

Q. And you ascertained which mines had received more individual, foreign and fuel cars than their percentage rating?

A. Yes, sir.

Mr. Gleason: If your Honor please, we object to the testimony sought to be drawn from the witness at this point, for the reason that the finding of the Commission that the conduct of the defendant railroad was discriminatory is not based upon any comparative finding existing between this mine and other mines in the region; secondly, that the evidence sought to be elicited from this witness would be misleading to the issue trying; and as incompetent, immaterial and irrelevant.

The Court: As I before observed, it is impossible for us to forecast what the ultimate effect of the testimony will be. So far as the questions are administrative questions we must take the findings of the Commission as the law of the case. Following whatever rule they have laid down on that, we determine what the amount of the damage is, and that is a question of fact, and that I understand is the point ultimately to which your inquiry is addressed?

Mr. Bikle: Absolutely.

The Court: On that basis we will overrule the objection and grant the plaintiff an exception.

(Exception noted for plaintiff by direction of the Court.)

By Mr. Bikle:

Q. In this examination of the sheets you say you

ascertained which mines had during October, 1904, received more individual cars and fuel cars than their rating would have given them of commercial cars?

A. Yes, sir.

Q. What did you do then in your further calculation?

A. I made a total of the ratings of those mines which had received the excess mentioned, and the number of individual and fuel cars which they had received, and I deducted that rating from the regional rating, and I deducted the amount of individual and fuel cars which they had received from the total cars available for distribution, and then that gave me the new regional rating. That is to say, a rating arrived at after deducting those figures. For the month of October the rating so deducted amounts to 3,614 cars. Deducting that from 20,829 cars gave me the remaining rating of 17,215 cars. They had received individual and fuel cars——

Q. That is, the mines that were covered by those ratings?

A. Yes. They had received 1,567 individual and fuel cars. By deducting that from the total cars placed in the region, 5,912, I have a resultant figure of 4,345 cars still available for distribution.

Q. The only cars that you excluded, then, were individual cars and fuel cars?

A. Individual and fuel cars.

By Mr. Gleason:

Q. How many cars did you say were available?

A. 4,345.

Mr. Roads: If the Court please, I understand that this testimony is predicated upon the idea that the defendant proposed to follow this testimony by the offer of these sheets, that have not as yet been produced, and that, of course, is subject to the cross-examination by counsel as to whether or not these sheets are admissible. There is no mistake about that?

MR. BIKLE: I think it was agreed yesterday that they should go in.

MR. ROADS: Not that we would agree they should go in, but that we would withdraw the objection with reference to the point that we made that they were not the original sheets. We do not know what is in the sheets. All of this testimony that this witness is giving is based upon what is contained in these sheets, and I understand that it is all predicated upon whether or not these sheets are admissible in evidence after we have had a chance to cross-examine on them. The point of my objection is that we want it understood that the figures that the witness has predicated his testimony upon, and his percentages, which is for the purpose of undermining the basis upon which the Interstate Commerce Commission found its award, are in these sheets, and whether or not they are correct we want to have an opportunity to cross-examine upon them, and if they are not correct then we want a benefit of an objection and a ruling.

THE COURT: Of course, that goes without saying. This witness does not pretend to know of his own knowledge anything about these conditions. He takes these figures as they are presented to him. Of course, his bookkeeping figures are correct, and if those figures are correct he merely gives us a tabulation.

MR. ROADS: We have an opportunity to object to this, the basis of his testimony, when these are offered in evidence?

THE COURT: Certainly. You reserve your right to cross-examine him as to the basis, and reserve your right to any cross-examination. All this witness really is is a calculating machine for us.

MR. ROADS: I understand, but the basis of his

calculation is found in these sheets that have not yet been offered.

MR. BIKLE: Those sheets were offered and received yesterday.

THE COURT: We will pass on that when the time comes. It is clear to the jury that this witness is not testifying to any facts, but ascertaining what the facts are as given to him he is merely giving you what they figure out.

By MR. BIKLE:

Q. What is that percentage which the cars placed, having eliminated these fuel and individual cars, which you have described, would bear to the region rating described as you have indicated by a reduction of the ratings of the mines, excluded in the month of October, 1904?

A. 25.24 per cent.

Q. What have you done with that percentage figure with respect to the plaintiff's mine?

A. I have taken his original rating, or, rather, his rating for the month, and I have found 25.24 per cent. of that figure, which shows the figure to which he is entitled.

Q. Then what was your next step?

A. I proceeded in the same manner with each month.

Q. Having found the cars to which he was entitled, using that percentage, did you find how many cars he received?

A. I took the number of cars he received as indicated on the blue print.

Q. Just as indicated there?

A. Yes, sir.

Q. And having found that you found whether that was more or less than the percentage of distribution to which he would be entitled under the figure you used—the cars, I mean?

A. Exactly. I prepared the schedule showing the over and short each month.

By The Court:

Q. Is that in tons or cars?

A. Cars.

Q. How many tons to a car?

A. Twenty-five tons to the car was the basis, I believe, until November 15th, 1905. I am speaking from memory now.

Q. We are taking this particular month now, October.

A. October, twenty-five tons to the car.

By Mr. Bikle:

Q. Did you go through the same process with respect to each month?

A. I did.

Q. During what period?

A. From October, 1904, to June 30, 1907, inclusive.

Q. You have spoken of the use of twenty-five tons as representing the lading of a car. Was there any change in that period in that regard?

A. I believe on November 15th, 1905—it may have been the 16th of November, 1905—the arrangement of these sheets was altered, and there was a foot note to the effect that wooden cars would be considered as thirty-five tons, and one steel car would be equal to one and a half wooden cars.

Q. You have indicated that in certain respects in this calculation that you have made you have used the figures shown on the blue print as we have described it, which has been offered as the defendant's Exhibit No. 1?

A. Yes.

Q. That involved the regional rating of all the mines, the total cars placed at all the mines, and the cars received by the plaintiff. Were there any in-

stances in which you departed from the use of the figures shown on the blue print?

A. Yes.

Q. In what months and in what respects?

A. In the months of April, May and June, 1907, I found that the plaintiff in his blue print had not included the empties over on any particular day as being available for distribution on the next day, which was a rule in force by the railroad company.

By Mr. Gleason:

Q. How do you know it was in force by the railroad?

A. From a footnote, I believe, on some of the sheets showing that.

By The Court:

Q. You made your calculation based upon that fact, which you understood to be the rule, whether it was the rule or whether it was not?

A. Yes, sir.

By Mr. Bikle:

Q. In all other respects excepting during those months that you have alluded to you took the figures as they appear?

A. No.

Q. I mean with respect to the total cars placed at all mines?

A. In respect to that I did.

Q. And in those three months you made that change for that reason?

A. Yes, sir.

Q. What was the other change you made, and for what reason?

A. The cars received by the plaintiff, as shown on his blue print, for the months of February, March, April, May and June, 1907, did not include empties over, and I included those empties over which were available from day to day.

Q. As shown on the distribution sheets?

A. As shown on the distribution sheets.

Q. And those are the only instances in which in the calculation that you made you used figures different from the plaintiff's blue print so far as the regional rating of all the mines, the total cars placed at all the mines, and the cars placed at the plaintiff's mine was concerned?

A. Yes, sir.

Q. I show you a blue print marked, "Defendant's Exhibit No. 3," and ask you whether that is a summary of the calculations which you have made for the months extending from October, 1904, to June 30, 1907, and whether it has been made in the manner which you have described?

A. It is the summary which I prepared, and it has been made in the manner in which I described.

Mr. Bikle offered in evidence the blue print marked, "Defendant's Exhibit No. 3," as a summary of the calculation made by the witness in the manner described.

Mr. Roads: If the Court please, we object to the offer of this summary prepared by the witness for the reason that it attacks the blue print called the distribution sheet that was offered in evidence, and is part of the record on which the Interstate Commerce Commission based its finding, which distribution sheet was offered in evidence pursuant to the suggestion of the Interstate Commerce Commission examiner after being prepared in pursuance of the understanding had between the plaintiff and defendant before the examiner at the office of the Pennsylvania Railroad Company, the defendant, in Philadelphia, and submitted to counsel on the other side and then placed in evidence. On the ground of estoppel, the company cannot now, after the production of a paper by joint action, pursuant to the suggestion of the Interstate

Commerce Commission, attack in this Court that distribution sheet. It is further objected to that this sheet contains the statement "Cars received by plaintiff as per plaintiff's blue print." The plaintiff denies that it is plaintiff's blue print in the sense that it is intended, but that it is the plaintiff's and defendant's blue print.

THE COURT: This calculation may be received not as a statement of any of the facts stated in it, but merely as to what a calculation basis, as he has explained his calculation, for October, 1904, would be for every month during that second period.

MR. ROADS: The objection goes to emphasize the position that we have taken heretofore on the first offer of defendant's Exhibit No. 1, wherein your Honor will remember that you admitted it as a declaration of the plaintiff against interest. It is to emphasize that objection that we repeat it now.

THE COURT: That does not preclude you from showing what the fact is. If there are any errors in this statement that you submitted, I will say now that I do not forecast any objection to your showing what they are, or that this calculation is based upon an erroneous statement of fact, or a misstatement basis of calculation. We are accepting it, and that I understand is all that this witness pretends to tell us, taking the facts shown on that blue print and making the calculations from them the calculations are right, but he does not vouch for the facts because he does not know anything about the facts. The substantial situation here now and I shall so charge the jury, is that so far as the administrative findings of the Commission are concerned they are the law of the case. So far as the facts are concerned, the number of cars and everything else that enters into what your damage is, that is a fact to be found by this jury.

Cross-examination.

By Mr. Gleason:

Q. Where do you live?

A. 5434 Sansom Street, Philadelphia.

Q. You are employed in this instance by the Pennsylvania Railroad Company?

A. Yes.

Q. To do this work?

A. Yes.

Q. Were you employed personally or your company?

A. The company was employed.

Q. The New York Audit Company?

A. No, sir.

Q. What company is it?

A. Price, Waterhouse & Company.

Q. What is your position with that company?

A. I am an accountant.

Q. You are just one of the accountants?

A. Yes, sir.

Q. Do you mean to say that you are just one of the rank and file?

A. No; I am one of their senior accountants.

Q. What experience have you had as an accountant?

A. I have had three years' experience with Price, Waterhouse & Company.

Q. That is, you worked three years at it?

A. I was experienced as an accountant before I went to Price, Waterhouse & Company.

Q. How long have you been an experienced accountant?

A. I would like to know just what you mean by an experienced accountant. If you mean a public accountant——

Q. I would like you to tell me what it is.

A. As a public accountant I have had three years' experience.

Q. Three years' experience?

A. As a public accountant.

Q. You were a bookkeeper before that, were you?

A. I was a bookkeeper and other things, yes.

Q. You have had three years' experience as an accountant with this company?

A. Yes, sir.

Q. When were you employed to go over this? When did you start your job?

A. In April of this year.

Q. What date?

A. (Referring to note book.) Without going all through my note book, I think April 7th.

Q. You have got that in your note book, have you?

A. Yes.

Q. When did you finish it?

A. The last day I worked on it was May 23rd.

Q. That is, you started in on April 7th, and the last day you worked was May 23rd?

A. Yes, sir.

Q. Did you work all the days between those times?

A. No, sir.

Q. Will you give us the number of days you worked at it?

A. I can if I calculate. I did other work in between.

Q. Certainly, calculate. That is what you are there for.

A. I make it sixteen days. I am not prepared to vouch that that is absolutely accurate.

Q. It may be less than that?

A. No, it would not be less. It may be more.

Q. You are positive it is more than that?

A. I cannot say positively unless I look up my time sheets.

Q. You do not know whether it is more or whether it is less, do you?

A. I can say that I did work sixteen days.

Q. Sixteen full days?

A. Yes, sir.

Q. How many hours a day?

A. I do not see what this has to do with the case at all.

Q. What is that?

A. I do not see that that has anything to do with this case at all.

Q. If you are the judge trying this case, you may pass on it.

A. Some days I worked eight hours, some days I worked four hours, and some days I worked six hours. Mostly eight hours.

Q. Mostly eight hours?

A. Yes, sir.

Q. Some days four hours and some days six hours?

A. The four hours would be mostly Saturdays.

Q. You did not work on Sundays?

A. No.

Q. Where did you do this work?

A. In our offices in the Commercial Trust Building.

Q. Here in the city?

A. Yes, sir.

Q. You did not leave your office at all?

A. Oh, yes; I left the office.

Q. Of course, but to do this work you did it in the office?

A. I didn't sleep in the office.

Q. That is rather strange that you didn't. Who brought you these books or these papers that are wrapped up here lying before you?

A. I went over to the Pennsylvania Railroad Company's office and obtained them.

Q. You did not know what they were?

A. Except what is written on them.

Q. Except what they told you?

A. No; except what is written on them?

Q. Except what is written on them?

A. Yes, sir.

Q. Of course, that is conclusive with you, isn't it? When you see anything written on a piece of paper that is conclusive with you?

A. Well, it depends on the circumstances.

Q. That is, if it is the Pennsylvania Railroad Company?

A. Oh, no.

Q. What are the circumstances?

A. If you will state a case I will tell you.

Q. What are the circumstances that you have in mind in this particular instance? That is the case I am stating.

A. I told you what I saw written on the sheets.

Q. That is all you knew about it, what you saw written on the sheets?

A. That is all I knew about it.

Q. This was just this April of this year?

A. April of this year.

Q. So that in these packages wrapped up here are what they call the distribution sheets?

A. Yes, sir.

Q. That is what the papers say they are?

A. Yes, sir.

Q. That is what is printed on them?

A. Yes, sir.

Q. Do you mean to say that there is a sheet for every day in the year there?

A. No; there is no sheet for Sunday.

Q. No sheet for Sunday?

A. No.

Q. And for every other day there is a sheet?

A. To the best of my recollection now there is. I have not seen the inside of those sheets since May.

Q. You have not seen them since May?

A. No; not the inside.

Q. Will you break open one of those packages and look at it a minute?

(The witness broke the seals on one of the packages and took sheets from the same.)

Q. They are the sheets for what period?

A. This is April, 1907.

Q. Do you swear that those are the same sheets that you made this statement from?

A. I do.

Q. Have you any mark on them?

A. They were sealed in my presence. I assisted in sealing them.

Q. You assisted in sealing them?

A. Yes, sir.

Q. Have you any mark on these sheets to identify them as the same sheets you made up your statement from?

A. None whatever.

Q. Your method of identifying these sheets, then, is not from the sheets, but because there is a red seal on the outside? Is that it?

A. Because it is the seal of Price, Waterhouse & Company.

Q. It is the seal of Price, Waterhouse & Company?

A. Yes, sir.

Q. That is your seal?

A. That is our seal.

Q. And that is the only thing you go by?

A. That is all I go by.

Q. These were out of your possession how long?

A. From sometime in May—probably May 23rd—until we received them from the Pennsylvania Railroad Company yesterday morning.

Q. From May, during June, July, August, September and October. Who is the custodian of this seal?

A. Our stenographer.

Q. Your stenographer?

A. Yes, sir.

Q. Have you had the seal in your possession all this time?

A. Personally?

Q. Yes.

A. No.

Q. Has this seal been used on these papers, but not other papers since that time, to your knowledge?

A. They have been used on other papers.

Q. In your business?

A. In the business.

Q. And all you base your identification of this paper on is a seal that your stenographer carries around, and you saw this sealed up, and you say that is the same seal that was put on in your presence in May?

A. Yes.

Q. How do you swear to it? Is not the seal that she puts on at any time just like any seal that she puts on at any other time?

A. Oh, no; she keeps this seal in the drawer.

Q. Each time she makes a different impression?

A. She keeps the seal in the drawer.

Q. And nobody can get at it?

A. Oh, no.

Q. And she never uses it without you are there?

A. Oh, I never said that.

Q. You did not say that?

A. No.

Q. Who explained to you about these assigned and unassigned cars? Who explained that rule to you?

A. My recollection now is that it was Mr. Haley.

Q. He is an employee of the Pennsylvania Railroad Company, is he not?

A. Yes, sir.

Q. And he gave you this explanation?

A. Yes, sir.

Q. You were not called before the Interstate Commerce Commission at Washington with this sheet, were you?

A. No, sir.

Q. You were not requested by this railroad to make out the sheet during the time of the hearing at Washington?

A. No.

Q. You testified here, or in your testimony you referred to the making up of this sheet. You referred to a period of three or four months, April, May and June, 1907, of cars held over. I ask you to find the sheets for those months.

A. This is one of them. (Indicating.)

Q. So this may get on the record, see that I am correct: I hold in my hand a distribution sheet, Pennsylvania Railroad Division, cars on the Tyrone Division, Tuesday, April 30th, 1907. Now, indicate in what column you found the holdovers?

A. The empties over?

Q. The empties over, or whatever you want to call them.

A. "Unconsigned loads over, hopper, steel, the last two columns of unassigned cars available for loading." "Unconsigned loads over, hoppers, steel, the last two columns of unassigned cars available for loading."

Q. There are two different kinds of lead pencil used on that sheet, apparently, are there not?

A. Apparently there are, yes.

Q. That is, there is a heavier lead pencil and a much lighter lead pencil?

A. Yes, sir.

Q. That is, the lead pencil along certain columns is quite heavy, is it not?

A. It is.

Q. And at other places very light?

A. Yes, sir.

Q. Is that an indelible lead pencil effect on there?

A. I don't know. I did not put these figures here.

Q. You are an expert accountant. Can you tell?

A. Is an expert accountant supposed to know anything about pencils?

Q. I don't know what an expert accountant is supposed to know. That is what I am trying to find out.

A. I know nothing about the pencil marks on the sheets.

Q. You do not know anything about that at all?

A. No.

Q. You do not know whether it is a common everyday lead pencil effect or an indelible lead pencil effect?

A. Not at all. I am not an expert on pencils.

Q. You know the difference between a pen effect and lead pencil effect, do you not?

A. Yes.

Q. But you do not distinguish these at all?

A. I can see that one is light and the other dark, that is all I can see.

By The Court:

Q. You cannot see anything more than the average man can see?

A. No more than any other man can see there.

By Mr. Gleason:

Q. Is there anything on these sheets to show when these hold overs were delivered at the mines; look at the sheet?

A. The sheet itself—I do not quite get your question.

Q. You know that there is a certain hour in the day that the cars will be delivered to the mines, is there not?

A. Yes.

Q. That is bound to occur?

A. Yes.

Q. The date at which these cars are delivered, is that right here?

A. This indicates the date at which the cars were delivered.

Q. That is the day of the month?

A. The day of the month.

Q. Is there anything on these sheets throughout

all of them, that you have given here—and if you are not certain I want you to look at it—is there anything on these sheets to indicate whether the cars were put in at 6 o'clock in the morning, 7 o'clock in the morning, 10 o'clock, at noon, or in the afternoon, of a certain day?

A. I believe not.

Q. That is the only information these sheets gave you from which you compiled this statement was simply the information of the date the car was put in there and not the time of the day?

A. Exactly.

Q. Did you have any instruction from this railroad regarding any average that you should strike about cars that might have been placed there too late for the men to fill that day?

A. No.

Q. They did not tell you that you were to make any concession to this man for any percentage of cars that might have been delivered too late to fill on the day they were put in and would have to be filled in the next day; they did not tell you to put in anything on that account in his favor?

A. No.

Q. They told you arbitrarily that every time a car was held over to count that as two cars against him, that is, not as two cars, but they told you to count that car as a car delivered to him on two days?

A. No, you have got the wrong impression. I have simply taken the car here as being delivered. They told me nothing about counting that over from one day to the other. If they were put on this sheet as being delivered on a certain day I put them as being delivered.

Q. On that day?

A. Yes.

Q. We will state this thing hypothetically. Supposing in the month of April you found there that a car had been put into their siding on the 10th?

A. Yes.

Q. And it was there on the 11th?

A. I would not know that from the sheet.

Q. You would not know that from the sheet?

A. No.

Q. You would not know when the car was held over from the sheet?

A. There is nothing there to tell me the car was held over except this "unconsigned empties." I cannot tell you whether it was placed there on the 10th or anything else.

Q. What is a hold-over then?

A. It is a car that has been placed in there at some prior date, and it is being held over on their siding which they have not used, and it is counted and is brought forward to the next day's sheet.

Q. It is counted twice now, is it not?

A. Yes.

Q. The one car is counted against these people twice and it is held over?

A. Yes, it is so for every mine.

Q. That information is volunteered; I did not ask for it. But I want to put this question, that so far as this mine is concerned, a car that is held over and was there three days is counted three cars, and four days four cars?

A. Yes.

Q. And if it is held two days it is two cars?

A. Exactly.

Q. And yet this sheet gives you no data as to the hour of the day that car was loaded or put in or removed?

A. It does not.

Q. Entirely blank on that?

A. Yes.

Q. Have you anything on these sheets to show deliveries of cars on Sundays?

A. My recollection is that there is no sheet here.

Q. We do not want your recollection?

A. (After looking at sheet.) There is no sheet in there for Sunday.

Q. Is there anything on the sheets of the other days to show deliveries of cars on Sundays?

A. No.

Q. That appears all throughout these, does it?

A. Yes.

Q. And according to these sheets then, if these sheets had a reflection of the actual delivery of the cars to Mr. Minds, then basing your statement generally on what you have seen in these sheets, there were no deliveries of the cars of Mr. Minds on Sunday, if these represent delivery?

A. Unless they are in the unconsigned empties held over. I cannot tell you as to that.

Q. I know you cannot tell me as to that, but you can tell me whether there is anything in these sheets?

A. I can only say there is no sheet here for Sundays.

Q. And there is nothing in the sheets to indicate delivery on Sunday?

A. No.

Q. How does it come, if you only selected three months or found three months in which you computed these hold-overs——

A. I did not compute the hold-overs.

Q. Oh, you did not compute them?

A. No.

Q. Who did?

A. I took them from the sheets.

Q. Did you compute them when you took them from the sheets?

A. I simply added the totals together.

Q. And you did that for three months?

A. Yes.

Q. Who told you to do that for three months?

A. I found that the plaintiff himself had included them in one montth.

Q. You found he had?

A. In the month of March, and I did the same for April, May and June.

Q. You found that Mr. Minds had included the others?

A. That is the other, included on the blue print.

Q. On the blue print?

A. Yes, for the month of March.

Q. On the paper that was offered in evidence here, on this paper (indicating Defendant's Exhibit 1)?

A. Yes.

Q. You found they had been included?

A. Included for the month of March.

Q. And then you took all the hold-overs you could find, did you not, or did you just take those for three months, was that all you could find?

A. They are included right the way through.

Q. Are you positive of that?

A. I am positive of that, yes.

Q. You are positive that in this second period, from October, 1907, that you computed the hold-overs all the way through?

A. No. The sheets change at one date. I can't tell you that positively; the sheets change at one date, but I do know this, that from the time the sheets change the plaintiff on his sheet counted his empties here.

Q. Did you not testify here you had only computed the hold-overs in three different months, April, May and June, 1907?

A. I said I had only added those hold-overs for those months, because the plaintiff had not done so.

Q. He had done so in all the others?

A. He had done so in all the others.

Q. Then this sheet is correct for those months, as far as the hold-overs is concerned, before the Interstate Commerce Commission?

A. Yes.

Q. The only correction you made on that is for three months?

A. Yes.

Q. There were four other months, cars were placed in there; what distinction do you make on the cars placed in February, March, April, May and June for 1907?

A. I am there referring to cars placed at the plaintiff's mine. In the first instance I am referring to——

Q. I know, but hold-overs?

A. They are both hold-overs, but in the first place I am referring to the total cars placed at all mines, and in the second place I am referring to cars placed at the plaintiff's mine.

Q. You mean in the three months you are referring generally then to the entire region?

A. To the entire region; yes.

Q. So far as the plaintiff is concerned then you referred to four months?

A. I referred to five months.

Q. February, March, April, May and June of 1907?

A. Yes.

Q. You stated in your examination that the Commission found that this mine could produce 560 tons of coal a day?

A. Yes.

Q. You mean by that that that was the finding of the Commission and not that we could not produce more coal?

A. I simply meant that the Commission found 560 tons a day.

Q. You do not presume to know, or I suppose do not know the actual capacity of our mines?

A. No.

Q. The Commission found that we could work twenty-two days per month, and I think you have already testified that if we worked at the capacity found by the Commission on the working days, as found by

the Commission, that we would have produced in the second period 357,280 tons of coal?

A. I do not recognize that figure.

Q. What would it be?

A. Let me understand that question. At 560 tons per day, twenty-two working days per month?

Q. Yes?

A. Do you want me to give you the monthly figure?

Q. From October 1st, 1904, to July 1st, 1907, working twenty-two days per month, for that period, what would we produce?

A. What do you want me to base that on, thirty-three months or twenty-nine months?

Q. On 560 tons a day.

A. Twenty-nine months or thirty-three months?

Q. I want you to base it on twenty-nine months?

A. 357,280 tons.

Q. Have you ascertained then what the per cent. of cars available for the distribution in the Clearfield region was during that period, or can you ascertain that? I think you testified it was 52 per cent.?

A. No, I did not testify that it was 52 per cent. I testified that if you took the ten percentages, it would arrive at 52 per cent., but I think I am sure that that is a wrong method of obtaining a percentage.

Q. You are sure that is the wrong method?

A. It is the wrong method of obtaining percentages, to add together and divide by 10.

Q. Have you ever been employed by the Interstate Commerce Commission?

A. Yes.

Q. They have accountants, too?

A. I presume.

Q. That is the wrong method they have adopted?

A. It is a wrong method.

Q. You say that as an expert, having worked for this railroad company; you have worked for three

years at this business, and you have done this job for the railroad company, and you condemn the method of the Interstate Commerce Commission as wrong?

A. It is not a matter of what I condemn. Any one knows that if you buy five apples at one cent, and buy one apple at ten cents, that your average is four and one-half cents an apple, and that is the method the Interstate Commerce Commission has used.

Q. That is the boyish way they are doing business down in Washington?

A. Even the wisest old man in history will acknowledge it.

Q. What figure did you give us; you take 560 tons for thirty-three months, using the multiple 33 instead of 29; I believe that was the figure you gave us before?

A. That was 406,560.

Q. If you took 52 per cent. of that, what division rate, what would it have left that we could have shipped, that is assuming that we received 52 per cent. of the division rate, how many tons would we have shipped of that 406,560 tons, our rated capacity?

A. I presume you want me to use the 52.7 figure?

Q. Yes.

A. That would be 214,257.12. You understand that that is a thirty-three months basis.

Q. And we actually shipped how much; the figures are 143,000, that is what we actually shipped; what would be our shortage if we could have shipped 214,257.12, and we only actually shipped 143,000 tons of coal; what would have been our shortage?

A. 71,257.12.

Q. Assuming that 68 per cent. of our coal in this last period has been found by the Commission would have gone to interstate points, 68 per cent., what would 68 per cent. of 71,260 tons be?

A. 48,454.84 tons.

Q. If the Commission found that our loss in this particular was 25.2 cents per ton, what would have

been the car shortage, multiplying 48,454.84 tons by 25.2 cents?

A. $12,210.62.

Q. Again taking the figures of the Interstate Commerce Commission, which you have used in your calculation, with the actual tonnage shipped in the second period of 143,000 tons, and assuming that the percentage of that actual tonnage shipped was 68.12 per cent. interstate, what would it be in actual tonnage of interstate shipments, how many tons; taking the 143,000 tons, which is the actual tonnage shipped from the mine in the second period as found by the Commission, and as evidently not disputed in the case, and taking the percentage of that 143,000 tons that was shipped to interstate points, at 68.12 per cent., what would be the tons shipped interstate?

A. There is one question I would like to ask; when you gave me that percentage before, did you give me twelve one hundreds?

A. I did not; I gave you 68. The exact figure is 68.1213. I cut off some decimals and made it just 68.12.

A. Now you want 68.12 per cent. of 143,000?

Q. Yes.

A. 97,411.68.

Q. The commission having found that owing to the discriminatory conduct of the defendant, that the actual cost per ton during the second period of mining coal was 1.08, and that if we had not been discriminated against we could have mined it and produced it at 88 cents, showing therefore an increased cost of 20 cents a ton, as found by the Commission, what would be the award under those figures at 20 cents for the increased cost on 97,411.68 tons?

A. $19,482.32.

Q. Reverting to the figure you had before of $12,210.62, I would ask you to add that $12,210.62——

A. $31,692.94.

Q. What was the finding of the Commission for that second period?

A. I have not the copy of that. I could not remember the figures.

Q. Get your copy.

THE COURT: What is it that you are asking?

MR. GLEASON: He has made a calculation showing the award on the second period for the two branches of damages that we claim for in that period. We claim first for damages and the Commission so awards us, for damages for the increased cost of production. That is one branch of the case. The Commission found that on account of the discriminatory practice against us, the cost of our coal was $1.23, and that it could be produced for 88 cents; in the second period they found that it cost us $1.08 to produce our coal, and we ought to have been able to produce it for 88 cents. That is the first element of damages. It would be the increased cost of production by reason of the discrimination of this company.

THE COURT: What is the use of our taking up the time to ask this witness what the Commission found as to these figures when we have them right here before us?

MR. ROADS: The purpose is to test the result of the finding the Commission bases——

THE COURT: It is all right to ask this witness on what basis he made these calculations, and then if he was misinformed, as to what the proper basis was, why, of course, he would say his calculation would be as wrong as the basis, because all he says is his calculation is right, assuming his basis is right. This witness, I understand, does not profess to be more than a calculating machine for us.

MR. ROADS: And in that sense, on the cross-examination my colleague was showing by his taking 52 per cent. of the distribution as the distri-

bution to the Tyrone Division, the result produced by that percentage is almost within a few dollars of what the Commission awarded.

MR. GLEASON: In other words, the purpose of the examination is, from our own standpoint, to test and prove the award of the Commission.

THE COURT: I understand this 52.7 percentage is a mere average of a number of other percentages, and he has followed it because that was given to him, without vouching for the correctness of that method of reaching the general percentage, the real percentage.

MR. GLEASON: Just as the witness the other day took the $1.23 as a standard and started to figure on it. That is what has occurred in this case.

EDMUND C. HALEY, recalled.

Paper marked Defendant's Exhibit No. 4, October 10th, 1916, J. C. W.

By MR. BIKLE:

Q. I show you paper marked Defendant's Exhibit No. 4, entitled, "General notice to shippers of bituminous coal," and ask you what that is?

MR. GLEASON: What is the purpose of this?

MR. BIKLE: I mean to offer this and show the rule of distribution which was in effect when the proceedings on which this action was founded were before the Commission and which was discussed and ruled upon by that tribunal.

MR. GLEASON: It is objected to as incompetent, irrelevant and immaterial.

THE COURT: The Interstate Commerce Commission has found that a certain rule was in effect. They have found whether or not that was a dis-

criminatory rule. If the Interstate Commerce Commission says that that was a discriminatory and unfair rule, we take their ruling on that as the law of the case. That rule is then a fair rule, and we will not permit the other side to attempt to attack the correctness of that finding, because it is not our place to decide whether these rules are fair or whether they are not fair. They are the law of the case. We take them as they are declared to be.

MR. ROADS: If Your Honor please, the witness is an accountant, as I understand. Do I remember?

THE WITNESS: I am a clerk.

THE COURT: He is in that department. They put out certain rules for the convenience of everybody, and as a practical necessity. They are put out in printed form and distributed as the rule of the company. They do not pass upon it, whether it is a fair rule, or unfair rule, or a proper or an improper rule, but they do know as a fact whether that is the rule upon which they are directed to act.

MR. ROADS: It is not proposed either to show that every notice of this rule was visited upon the plaintiffs in this case. There is nothing but a copy of a paper here and it is offered, and the witness proposes to establish a rule of car distribution, is it?

MR. BIKLE: Yes.

MR. ROADS: In that form.

THE COURT: While, of course, that is in print, we know that it was printed from a copy, and necessarily must have been, or it could not have been set up, but what we are concerned with is whether or not that is their real rule, not whether it is a copy from which the printing was done.

MR. ROADS: There is another objection to it,

if your Honor please. This, by reference to it, shows that it is a general notice to shippers of bituminous coal dated January 1st, 1906, in accordance with the circular letters issued to shippers of bituminous coal in June last. I object to it unless they put in all that relates to this circular letter and include in their offer that they propose to visit notice upon the plaintiffs in this case of these matters.

THE COURT: If the purpose is to show by this witness, or any witness who knows, whether or not that was the rule rating adopted by the railroad company at a particular time, I will take the responsibility of permitting them to do it without going to the manuscript, because if in that form the rule was put out and distributed to their employees, and to shippers and others, then in real substance it becomes the rule, and if there was a mistake made in the printing of it, and it does not follow the manuscript, that becomes the rule which they put out. I will admit and give you an exception.

Exception noted for plaintiffs by direction of the Court.

MR. ROADS: I believe Your Honor gave us an exception on overruling the objection heretofore made in regard to the offer of this sheet? If not, Your Honor will grant it?

THE COURT: I think the record fully shows that.

By MR. BIKLE:

Q. What is this document, marked Exhibit 4, that I show you?

A. It is a general notice, sent out to all mine operators, shippers of bituminous coal, regarding the distribution of cars after January 1st, 1906.

Q. How long did that rule remain in effect, do you know?

A. That rule remained in effect until the 31st of October, 1910.

Q. Do you know what was the occasion for the change?

A. The order of the Interstate Commerce Commission passing on this rule.

MR. BIKLE: I offer it in evidence.

By MR. ROADS:

Q. You say it was intended to be sent out?

A. No, sir; it was sent out; it was printed.

By MR. GLEASON:

Q. How many times was it changed?

A. That notice was not changed between January 1st, 1906, until October 31st, 1910.

Q. It was not changed?

A. No.

Q. How many times had it been changed before January 1st?

A. I could not answer that.

Q. Have you any idea?

A. No.

Q. Have you no knowledge on that at all?

A. No.

Q. Were you working for the railroad company at that time?

A. Yes, but not in connection with work of this kind.

Q. Can you get the different variations of this rule, from July 1st, 1902, down to July 1st, 1907?

A. I will try to.

Q. Was not this the rule that the Interstate Commerce Commission declared discriminatory?

A. That was the rule, that is the one they acted on.

MR. BIKLE: In the finding of the Commission in the present proceeding there is a reference made to the previous finding of the Commission in the case of the Hillsdale Coal and Coke Company vs.

the Pennsylvania Railroad Company with respect to the rules of distribution which should prevail. We desire to offer in evidence a certified copy of the Commission's report and order in the case of the Hillsdale Coal and Coke Company vs. the Pennsylvania Railroad Company, Opinion No. 1383.

MR. ROADS: What is the purpose?

THE COURT: As I follow it the Commission incorporated the findings there made in their findings made in this case.

MR. BIKLE: They referred to it by reference to the——

THE COURT: Which they declared were a part of their findings.

MR. GOWEN: They established in the Hillsdale case the rule of distribution which should be followed.

THE COURT: It seems to me the proper view of their administrative findings is that that is law and you get that as you would get any other law, by reference to it. You do not have to prove your law by evidence, but inasmuch as they incorporated that finding with this finding, it becomes a part of it. For whatever bearing it has, you may take it.

MR. ROADS: We think they ought to point out what relevancy they claim.

THE COURT: It is only admitted on this ground. I think it is a matter which the Court would be bound to take judicial notice of, that you could refer to, and say that that was the law of this case. Why? Because the Commission had so ruled in the Hillsdale case, and that you would not be required to establish your law through the evidence, but in their finding they referred to that, and by reference they made that ruling a part of their ruling in this case.

MR. ROADS: But if the Court please, what I want to call to the Court's attention is that we think that counsel on the other side should point out—not offer the whole opinion in this whole case, but in fairness to the Court, the jury and the counsel on the other side, should point out what special matters in this whole record they claim have any relevancy or bearing on the points at issue here. We were obliged to do it when we offered the opinion in our own case.

THE COURT: But counsel have explained their purpose in offering this, and that is to say to make the Hillsdale opinion available in this case, whether you call it law or whether you call it a finding of fact, it is evidence.

MR. BIKLE: As to the administrative ruling.

THE COURT: I think it is in the case anyhow. I think either of you would be at full liberty to use that ruling to determine what the law of the case it, just as you would be permitted to refer to a rule of the Court. It is really a decision, and it is a decision of a Court, not only of competent jurisdiction, but exclusive jurisdiction, on administrative questions, but still I think it is unnecessary, but I can understand why counsel prefer to be on the safe side, and for that purpose and to that extent it is admitted.

Opinion of the Interstate Commerce Commission No. 1383 marked Defendant's Exhibit No. 5, October 10th, 1916, J. C. W.

DEFENDANT RESTS.

THE COURT: I would like to inquire of counsel in the case as to this matter. I understand that there is no question raised here as to the finding of a shortage in the first period of 95,123.68 tons. That is correct?

MR. BIKLE: That is correct.

THE COURT: I notice a further finding that of that tonnage the 3838.04 tons were within the interstate rule, the implication being that the termini of that were not intrastate category. Are we to take 3878.04 or 9523.68?

MR. BIKLE: 3878.04, because that is the only tonnage that is found would have moved to interstate destinations. We do not dispute here the finding of the Commission, nor the division which they make of the tonnage.

THE COURT: The only reason I called attention to it was that agreement on the 9523 without the qualification might become misleading.

MR. BIKLE: We do not dispute the division that they made.

MR. GLEASON: As I understand the Court has admitted the entire record, or it stipulated that the entire record is admitted by agreement of counsel for whatever purposes either side may wish to use it.

THE COURT: I do not understand the stipulation technically to have gone to that extent. If you mean it to be as broad as that, you may so consider it, but I understood the stipulation merely went to the distance that if there is any part of that record which either side desire to go in, either side may offer it without objection from the other side, but until it is offered, technically speaking it is not in.

It will be understood for the purposes of this case that any part of that record may be considered as in evidence and brought to the attention of the jury.

At 12.30 the court took a recess until 1.30 p. m.

1.30 p. m.

Present: Parties as before noted.

REBUTTAL EVIDENCE ON BEHALF OF THE PLAINTIFF.

MR. GLEASON: Your Honor, at this point we desire to offer the entire record and proceedings before the Interstate Commerce Commission at Washington in this matter.

THE COURT: I do not think it is necessary to do that. The entire record is considered as offered and considered as admitted. So that either of you are at liberty to refer to any parts of it that you care to.

MR. GLEASON: With that understanding, that the record is admitted, I just want to refer then to parts.

THE COURT: If there is any part of it that either of you want to have appear as part of the record of the case, put that in and we will have it entered upon the record. But either of you are at liberty, whether you offer it or not, to refer to it.

Mr. Gleason read from the record of the Interstate Commerce Commission the following testimony, appearing at page 6 thereof:

"JAMES H. MINDS, called as a witness, and being duly sworn, testified as follows:

Direct-examination.

Mr. Roads: Mr. Minds, how old are you?

Mr. Minds: 61 years of age the 10th of last August.

Mr. Roads: What experience have you had as a miner of coal?

Mr. Minds: I was raised in the hard coal region.

Mr. Roads: In Schuylkill County, Penna.?

Mr. Minds: Schuylkill County, Pa.

Mr. Roads: What experience have you had in mining coal?

Mr. Minds: I was going to tell you. I was raised right in the coal mining district and went first to work at a mine before I was eight years of age, picking slate. From that I growed up in the business and—

Mr. Roads: You have had what experience, just give in years how many years experience you have had in the anthracite and bituminous coal mines?

Mr. Minds: I have had over 40 years' experience.

Mr. Roads: Were you employed in the capacity of foreman for the Philadelphia & Reading Coal & Iron Company for years?

Mr. Minds: I did. I had charge of the Linwood Colliery at the same time. Later I had charge of what was known as the Turkey Run Colliery.

Mr. Roads: When did you come to the Clearfield region?

Mr. Minds: In 1874. The superintendent of the Coal & Iron Company, William Kendrick, would have me come out to the Clearfield District and put in what is known as the Kendrick shaft.

Mr. Roads: Have you been engaged in mining bituminous coal from 1874 to the present time?

Mr. Minds: For part of that time I was back in the hard coal region at that Turkey Run Colliery.

Mr. Roads: How many years have you been engaged continuously in mining bituminous coal?

Mr. Minds: I think since 1882 I have been continuously mining bituminous coal.

Mr. Roads: How long have you been operating at Webster No. 4 Colliery?

Mr. Minds: We started to open it in 1885. Shipped the first car of coal, I think, in July, 1886.

Mr. Roads: Where is this mine located with reference to railroads and towns?

Mr. Minds: It is between a mile and a quarter and a mile and a half west of Ramey.

Mr. Roads: Is it on the Moshannon Branch of the Tyrone Division of the Pennsylvania Railroad?

Mr. Minds: Yes, sir.

Mr. Roads: How far from Tyrone does the branch run off?

Mr. Minds: Something like between 27 and 30 miles.

Examiner Brown: Towards Clearfield?

Mr. Minds: Yes, branches off at Osceola and then towards Houtzdale, about a mile from what is known as Madera Junction.

Mr. Roads: Is that the name of the junction where the Moshannon Branch joins the main branch?

Mr. Minds: No, it is the junction—it was called Madera Junction, because that branched off to my place and to the place known as Vulcan.

Mr. Roads: What is the name of the branch on which Webster No. 4 is located?

Mr. Minds: On the Moshannon Branch.

Mr. Roads: What is its length?

Mr. Minds: Well, its terminal is at Sandy Bridge, and it begins at Osceola.

Mr. Roads: How many miles is it from Osceola to Webster No. 4?

Mr. Minds: About eleven, I think.

Mr. Roads: What town or borough is nearest to your operation?

Mr. Minds: What is known as Beulah City is the closest. Smoke Run comes next and Ramey next.

Mr. Roads: What is the population of these places?

Mr. Minds: I could not tell that exactly, possibly 1000 or 1200.

Mr. Roads: Ramey is a borough, is it not?

Mr. Minds: Yes, sir.

Mr. Roads: And its boundary line is how near to your mines, I mean Webster No. 4?

Mr. Minds: One corner of it—

Mr. Roads: Within a quarter or a half mile?

Mr. Minds: No, it takes in quite a lot of my territory. It takes in what is known as the Murray property. It takes in all of that property which is in my lease. I am speaking now of the surface. It is part of the Haggerty lease.

Mr. Roads: This leasehold estate extends over to and is included in the boundary line of the borough of Ramey?

Mr. Minds: Yes, there are 100 acres in the borough of Ramey.

Mr. Roads: What is your nearest neighboring operation, bituminous coal operation?

Mr. Minds: The nearest neighbor is the Berwind-White Coal Mining Company.

Mr. Roads: What is the name of it?

Mr. Minds: No. 7, No. 16, and No. 27.

Mr. Roads: What is the nearest?

Mr. Minds: The nearest is No. 7. Eureka No. 7.

Mr. Roads: Is that the nearest operation?

Mr. Minds: Yes, sir.

Mr. Roads: How near is that to Webster No. 4?

Mr. Minds: We run right up to each other, we are separated by the line of the property, that is all. Do you mean the distance from the openings?

Examiner Brown: The property adjoins. Now, how far is it from your tipple to theirs?

Mr. Minds: Between half and three-quarters of a mile.

Examiner Brown: On the same branch?

Mr. Minds: Yes, sir.

Examiner Brown: Yours is above?

Mr. Minds: No. Here is the junction, and this runs down to Madera, and here is the branch that runs out to my place, and they are about 300 yards from the junction on the branch that runs down to Madera.

Mr. Roads: What do you call that branch?

Mr. Minds: That is the Madera Branch.

Mr. Roads: Have you a lease with the Madera Coal & Improvement Company?

Mr. Minds: Yes, sir.

Mr. Roads: How many acres does that embrace?

Mr. Minds: I think that is 70 acres.

Mr. Roads: How many acres altogether have you under lease—I mean by you the Bulah Coal Company?

Mr. Minds: I understand. Do you mean at the present time, or that we had there?

Mr. Roads: Any time from 1902 to the present time.

Mr. Minds: I have the Haggerty lease and the Madera Coal & Improvement Company's lease.

Mr. Roads: The Haggerty lease covers 350 acres?

Mr. Minds: Yes, sir, with allowances.

Mr. Roads: What is the actual acreage?

Mr. Minds: Something over 400 acres, I think, with allowances.

Mr. Roads: Although the lease calls for 350 acres, and allowances, the allowances make up a total of 400 acres?

Mr. Minds: Yes, sir.

Mr. Roads: Now, under the Jordan lease, that was 160 acres by the terms of the lease. Is there any additional?

Mr. Minds: The allowances.

Mr. Roads: Do you know how much the Jordan lease is increased by the allowances, over 160 acres?

Mr. Minds: I don't know. I never had it run up.

Examiner Brown: About 10 acres, if it is 6 per cent.

Mr. Roads: I suppose so. I don't know. (Addressing the witness) How about the Madera Coal & Improvement Company's lease?

Mr. Minds: That was simply for 70 acres. The line was run around the crop. It did not take in the tract of land. There was no allowances.

Mr. Roads: Simply 70 acres?

Mr. Minds: That is my understanding.

Examiner Brown: Making a total of 640 acres?

Mr. Roads: Yes. (Addressing the witness) That is the total acreage that is embraced within that right to mine under the leases?

Mr. Minds: Yes, sir.

Mr. Roads: Now, what veins underlie your leasehold estate?

Mr. Minds: The D vein and the B vein and the A vein. The same veins that underlie all the region about there.

Mr. Roads: State whether or not one of those is called the Moshannon vein?

Mr. Minds: That is the D vein. It is the D vein known as Moshannon around there.

Mr. Roads: What is the reputation of that vein for quality of coal?

Mr. Minds: It has always been good.

Mr. Roads: State whether or not it has produced one of the best bituminous coals?

Mr. Minds: It was always so understood everywhere in the market.

Examiner Brown: Is it steam or domestic coal?

Mr. Minds: It is coal that is used for different purposes, steam, iron and smithing.

Examiner Brown: It is rather a splint coal, hard?

Mr. Minds: No, it is not a very hard coal. It is a bituminous coal, and the purer it is the less stratas that is in it, the better the coal, the less sulphur.

Mr. Roads: Low in sulphur?

Mr. Minds: Yes.

Mr. Roads: And high in carbon and low in ash, is that right?

Mr. Minds: That is its history.

Mr. Roads: Now, what is the thickness of the Moshannon vein on that property?

Mr. Minds: It is from 2½ to 5½ feet.

Mr. Roads: From 2½ to 5½ feet?

Mr. Minds: Yes.

Mr. Roads: What is the thickness of the B vein?

Mr. Minds: I could not tell what that is there, from the fact that we have not developed it.

Examiner Brown: You have been mining altogether on the D vein?

Mr. Minds: Yes, sir.

Examiner Brown: How much of that vein is 2½ feet thick?

Mr. Minds: Possibly one-third of it. Let me see, did I catch your question?

Examiner Brown: How much of the property you have mentioned so far—how much of that vein is 2½ feet thick?

Mr. Minds: I could not say exactly how much is 2½ feet, because it runs from 2½ in some places to 3 in some places, and 2 feet and 8 inches in some places, and 3 feet 4 inches in some places. Possibly 100 acres, though, are 2½ feet.

Examiner Brown: Can you mine a 2½ foot vein at a profit?

Mr. Minds: We have; yes, sir. It is a coal that brings a good price in the market.

Mr. Roads: What is the average thickness of these leasehold estates of the Moshannon vein? You say it runs from 2½ to 5½ feet, what would you state to be the average thickness of that vein on your property?

Mr. Minds: I never figured on that. Probably it would average 3½ up to 4 feet.

Mr. Roads: How long a time has the Beulah Coal Company mined there?

Mr. Minds: They have been mining coal there since I think it was July, 1886.

Mr. Roads: Have you mined anything beside the Moshannon vein on this property?

Mr. Minds: No, sir.

Mr. Roads: Veins B and A are both in virgin?

Mr. Minds: They are all there, yes.

Mr. Roads: How much of the Moshannon vein is left in a virgin state?

Mr. Minds: Something like 200 acres, I think, or thereabouts.

Mr. Roads: Describe briefly, Mr. Minds, your inside workings, the length of your headings, your main headings and side headings, in distance, I mean?

Mr. Minds: I could not give you that exactly from the fact that I opened my mine as near the center of the tract as I could and then worked both ways and on the northern direction I drove clean to the line of the Haggerty property, and on the western, the mines of Jordan, I drove to the line and took in that 70 acres of the Madera.

Mr. Roads: How long is that mine heading, and how wide?

Mr. Minds: I generally drive 8 or 9 feet wide. The length I could not tell you.

Mr. Roads: Can you not give us what it is, about—approximate it?

Mr. Minds: Possibly three-quarters of a mile.

Mr. Roads: Three-quarters to a mile?

Mr. Minds: Between that. I do not think it would be quite a mile.

Mr. Roads: State whether or not there are plenty of openings, rooms for miners to work?

Mr. Minds: There certainly have been.

Examiner Brown: How many rooms have you got there?

Mr. Minds: I could not tell you just how many rooms, I did not count them. You see we drive the main heading, and then we drive our side headings about 100 yards apart and every 45 feet I turn a room.

Mr. Roads: How many side headings have you leading from the main heading?

Mr. Minds: 18 or 19 from the main heading.

Mr. Roads: And from those side headings on both sides you drive what you call rooms?

Mr. Minds: Yes, sir.

Mr. Roads: State whether or not those rooms or those inside mines are of such a character as during the period from 1902 on to 1907, say the middle of the summer of 1907, you could have put miners at work, enough miners to produce the full output capacity of your mines?

Mr. Minds: I did not understand that question properly.

(Question repeated by the stenographer.)

Mr. Minds: No, I could not.

Mr. Roads: Didn't you have sufficient openings there to put miners at work so as to mine the coal?

Mr. Minds: Let me draw your attention to what you said, you said the capacity of the mines. The capacity of the mine ranges anywhere from 1000 to 1200 tons. I did not ship up to that.

Mr. Roads: I did not ask you about shipments. What I wanted to know was whether you did not have openings sufficient to put miners to work there to mine the full capacity of your tipple?

Mr. Minds: I certainly had.

Mr. Roads: What was the output capacity of your mine, say in 1902?

Mr. Minds: Do you mean what we put out at that time?

Mr. Roads: No, I asked what was your output capacity?

Mr. Minds: The facilities for output?

Mr. Roads: Yes.

Mr. Minds: Anywhere from 1000 to 1200 tons.

Mr. Roads: That is per day?

Mr. Minds: Per day; yes, sir.

Examiner Brown: Could you have loaded that much?

Mr. Minds: Yes, sir.

Examiner Brown: You had that capacity on your tipple?

Mr. Minds: Yes, sir. You see, in the first place, the capacity of the mine is based on three things. The first is the territory, the coal, the second is rolling stock, and the third is your tipple. I started in with all that, made all those preparations in the beginning when I started to open the colliery, and I maintained them up to the present day.

Examiner Brown: How many mine cars have you?

Mr. Minds: Between 145 and 160.

Examiner Brown: Say 150. What is the capacity of those cars?

Mr. Minds: A ton and a half.

Examiner Brown: What is the power?

Mr. Minds: Two 40 horse power engines for hoisting up the incline. The balance is mules.

Examiner Brown: How do you air your mines?

Mr. Minds: By furnace. Now we air it by fans.

Examiner Brown: That is run by your central plant?

Mr. Minds: Run by steam. When I said rolling stock I meant mules and wagons and the engines.

Mr. Roads: Now, as to your drift openings, is there a difference in the elevation between the drift opening and your tipple, the head of your plane?

Mr. Minds: Yes, sir.

Mr. Roads: What is that, in feet?

Mr. Minds: It is about 150 feet.

Mr. Roads: Perpendicular or on an incline?

Mr. Minds: Perpendicular. The length of the incline is 700 feet.

Mr. Roads: Your motive power is steam?

Mr. Minds: Yes, sir.

Mr. Roads: And you hoist by engine and cable?

Mr. Minds: Yes, sir; four or five wagons at a time.

Mr. Roads: What is the capacity of your tipple?

Mr. Minds: Why that is just what I explained. It runs from 1000 to 1200 tons per day. I have two tipples and one dump.

Mr. Roads: In your petition, No. 1136, you set out that you have the necessary appliances for mining and shipping from your mine at least 600 gross tons?

Mr. Minds: I took that from the rating of the company, and from what we had shipped when we got cars to ship.

Examiner Brown: Then these figures that you have been giving represent your maximum capacity?

Mr. Minds: Yes, sir.

Examiner Brown: From 1000 to 1200 tons a day?

Mr. Minds: Yes. I started out with the idea of having a colliery to ship 1000 tons a day.

Examiner Brown: Have you maintained that from 1902 to the present day?

Mr. Minds: All it lacked at any time was to put on rolling stock and put in the men.

Examiner Brown: And the plant is in good shape now?

Mr. Minds: The plant is in good shape now; yes, sir.

Mr. Roads: What is the condition of your facilities there, your tipple and your plane?

Mr. Minds: I generally strive to keep everything in first class repair.

Mr. Roads: Is it in first class condition?

Mr. Minds: Yes, sir.

Mr. Roads: Now, give us an idea of the total amount that you have invested in the plant , that the Bulah Coal Company has invested in that plant?

Mr. Minds: I never run that up exactly. Getting in there, in the first place, it was a little troublesome to get in.

Mr. Roads: Can you give us the total amount that you have invested there?

Mr. Minds: Possibly railroad cars and all would run it up between $75,000 and $80,000.

Mr. Roads: State whether or not in addition to that you have a number of cars that are not owned by the company, but are used in its business?

Mr. Minds: At the time Mr. Matz died, we had a contract for 25 cars, and after his death, Mrs. Matz did not feel able to keep up her end in regard to the cars, and I took them on myself.

Mr. Roads: You bought them yourself?

Mr. Minds: Yes, sir.

Mr. Roads: The company does not own them, but they are used in conjunction with the business of the Bulah Coal Company?

Mr. Minds: Yes.

Mr. Roads: How many individual railroad cars does the Bulah Coal Company own?

Mr. Minds: 25 of 80,000 pounds capacity?

Mr. Roads: And they cost the company how much, about?

Mr. Minds: I think it was $27,500 they cost at the shop.

Mr. Roads: And that is part of the plant, and is included in your estimate of the amount invested as being between $75,000 and $80,000?

Mr. Minds: Yes, sir.

Mr. Roads: As I understand you, the area that is operated by the Berwind-White Coal Company at their No. 7 operation—that is about a quarter of a mile from your tipple to theirs?

Mr. Minds: No, it is half or three-quarters of a mile between my tipple and Eureka No. 7.

Mr. Roads: And the territory operated by you, I mean your leasehold estate, adjoins that of the Berwind-White Coal Company?

Mr. Minds: Yes, sir.

Mr. Roads: State whether or not the Moshannon or D and the B and the A veins continue right through on to their property and the same veins are upon Eureka No. 7 as you have on your property?

Mr. Minds: They have them; yes, sir.

Mr. Roads: State whether or not at Eureka No. 7 they worked the same vein, Moshannon vein, that you have worked and are now working?

Mr. Minds: Yes, sir.

Mr. Roads: Your operation at Webster No. 4 is right in the heart of this mining region in Clearfield County, is it not?

Mr. Minds: It is supposed to be; yes, sir. There are mines there on every side of me.

Mr. Roads: It is a mining population all the way through here, is it not?

Mr. Minds: Houtzdale is a great mining district, Brisbin and Sterling. They are all close at hand.

Mr. Roads: What is the distance to Houtzdale from your operation?

Mr. Minds: About four miles, I suppose, something like that.

Mr. Roads: And Houtzdale is quite a good sized town, of 10,000 or 12,000 inhabitants?

Mr. Minds: I don't just exactly know the inhabitants.

Mr. Roads: How many miners' houses have you at your operation?

Mr. Minds: I haven't got any miners' houses. I have some houses, the same as I have the cars, but there is none belonging to the company.

Mr. Roads: There is a mining population living all around you?

Mr. Minds: You did not let me answer the question you asked me in regard to Houtzdale. Houtzdale at one time, and vincinity, was calculated to have about 12,000 inhabitants. That took in Sterling and Brisbin and men from all of those places come to work at my colliery.

Mr. Roads: State whether or not when you have steady work in your mines, there is any difficulty for you to obtain the labor necessary for you to mine the full capacity of your mine?

Mr. Minds: When I got cars regularly I never had any trouble in getting men. I could get all the men I wanted.

Mr. Roads: You were rated at 560 tons per day by the Pennsylvania Railroad Company, or 16 cars a day of 35 tons capacity each, as of February 1st, 1906, I believe?

Mr. Minds: Something like that.

Mr. Roads: It is alleged in the petition, if the Examiner please, and admitted in the answer.

Examiner Brown: Yes, sir.

Mr. Roads: What was the greatest shipment in net tons that you made or that the Bulah Coal Company made at its plant, at Webster No. 4?

Mr. Minds: Something over 15,000 tons.

Mr. Roads: Something over 15,000 tons a month?

Mr. Minds: Per month; yes, sir.

Mr. Roads: And when was that?

Mr. Minds: I don't know. I would have to go to the books.

Mr. Roads: Can you give us an idea when that was?

Mr. Minds: I ain't sure whether it was in 1899 or 1900.

Mr. Roads: About 1900?

Mr. Minds: Somewhere around there.

Mr. Roads: Now, the rating of Eureka No. 7, the Berwind-White Coal Company's mine, which is the adjoining operation to you, to your Webster No. 4, was 14 cars, was it not?

Mr. Minds: I could not tell you the rating—I was rated the highest until Berwind-White opened up their No. 28, and then they surpassed me.

Mr. Roads: (Addressing the Examiner) That appears by paragraph No. 7 of the complainant's petition. We would like to withdraw this witness for the present, and put on another witness.

Examiner Brown: Very well.

(Witness excused.)"

Mr. Gleason also read from the record of the Interstate Commerce Commission the following testimony, appearing at page 27:

"ELIAS C. DAVIS, called as a witness, and being duly sworn, testified as follows:

Direct-examination.

Mr. Roads: What is your business?

Mr. Davis: Bookkeeper and shipping clerk.

Mr. Roads: Shipping clerk for the Bulah Coal Company?

Mr. Davis: Yes, sir.

Mr. Roads: How long have you occupied that position?

Mr. Davis: About 18 years.

Mr. Roads: Did you make a table, computed from data that was kept by you, in regard to the capacity of the Bulah Coal Company's operation at Webster No. 4, showing the number of working days, the capacity at all times based upon 16 cars rating per day, showing the actual output, the loss in tons, the average price of coal, the average cost of production, the loss per ton, and the total loss between 1902 and June, of 1907?

Mr. Davis: Yes, sir.

Mr. Roads: This statement was made up by you from data made by you and kept in the books of the company, books under your charge, and kept by you?

Mr. Davis: Yes, sir.

Mr. Roads: Now, take up the first item under date of July 26th, 1902. You give there the capacity at full time as 560 tons per day, at 16 cars, 35 tons each, as 14,560 tons. That covers the monthly capacity of the mine, does it not?

Mr. Davis: Yes, 26 working days.

Mr. Roads: Now, the actual output you give as 8,234 tons. Where did you get that data?

Mr. Davis: From the coal mined and shipped.

Mr. Roads: What do you call that book you keep that record in?

Mr. Davis: It was taken from the payrolls and number of tons mined.

Mr. Roads: Have you got those books with you?

Mr. Davis: Yes, sir.

Examiner Brown: Do you sell run-of-mine coal?

Mr. Davis: That is run-of-mine.

Examiner Brown: Some of it did not go as slack?

Mr. Davis: No, sir; all run-of-mine.

Examiner Brown: When you got what your pay-rolls showed you had what was actually shipped?

Mr. Davis: Yes, sir.

Mr. Roads: My idea is to show how this first line on the statement is made up, and then make a general statement in regard to all of them.

Examiner Brown: That they were made in the same way?

Mr. Roads: Yes, sir. (Addressing the witness.) Now, explain to us how you got that actual amount of tonnage that was shipped. You have it under the head of actual output.

Mr. Davis: The total number of tons mined and shipped that month. That was taken from the report of coal shipped daily.

Mr. Roads: The books show those entries you have given here?

Mr. Davis: Yes, sir.

Mr. Roads Now, then, the loss in tons, the next item. How do you arrive at those figures?

Mr. Davis: That was the difference between the capacity at 16 cars of 35 tons capacity each, 560 tons per day, and the actual amount mined.

Mr. Roads: That represents, you say, the loss in tons, by taking the total capacity of the mines for the month and deducting—

Examiner Brown: You mean the rated capacity when you say total capacity?

Mr. Roads: Yes, the rated capacity. The difference between that represents this item of loss in tons, to wit, 6,276, under the date of this item, July 26th, 1902. Now, you have fixed the average price of coal

during the month of July, 1902, at $2.39. How did you make that up?

Mr. Davis: That is taken from our shipping book.

Mr. Roads: Have you that in court?

Mr. Davis: Yes, sir.

Mr. Roads: Just refer to that shipping book and tell us how you get at that $2.39 cost, give us the item?

Mr. Davis: I took the various orders at various prices secured during the month, the month of July, as referred to in the data. One price was $2.00, another $2.10, another $2.15, another $2.25, another $2.35, another $2.50, another $2.60, another $2.65, and another $2.75. Totalling those and dividing by the number of prices given, I got an average price of $2.39.

Mr. Roads: And those prices are actual prices received from coal shipped, as appears from the book before you?

Mr. Davis: Yes, sir.

Mr. Roads: Now, then, the next item is the average cost of production. You state that at 90 cents per ton. You reach that figure how?

Mr. Davis: That was obtained by the total amount of the payroll for the month. The payroll, including mining and all labor and all expenses attached to the month's work to put this tonnage on the cars, and divide it by the tons mined and shipped.

Mr. Roads: That is from the actual cost?

Mr. Davis: Yes, sir.

Mr. Roads: Have you a book there which that data was put in?

Mr. Davis: Yes, sir.

Mr. Roads: What do you call that?

Mr. Davis: That is called the payroll book. We keep the payrolls, and they are summed up at the end of the month. Say, two payrolls in a month.

Mr. Roads: Give us the figures from which that was made up?

Mr. Davis: Payroll, first to 15th, $2,721.61; payroll

16th to 31st, last half of July, $3,791.16; royalty on coal $903.93; making a total expense for the month of $7,416.70, divided by the actual output, that is the tons mined and shipped, 8284 tons, gives an average cost of 90 cents.

Mr. Roads: What would be the effect of a greater shipment of coal on the cost of production?

Mr. Davis: On that same basis I figured that if we had shipped the capacity of the mine, the rated capacity of the mine being 14,560 tons, our cost would have been at the rate of 83 cents.

Examiner Brown: Computed in the same way?

Mr. Davis: Yes, sir.

Mr. Roads: Averaging it all the way through, say, as near as you can tell, what is the cost of producing a ton of coal at Webster No. 4, since July, 1902, on say—suppose we make it on 8,284 tons per month?

Examiner Brown: That would be a matter of computation.

Mr. Roads: I think I have it exactly here, at 90 cents, that it is about 80 or 90 cents, somewhere in there, generally speaking, and it varies, of course, with the shipments, the greater the shipment the less the cost of production per ton.

Mr. Davis: Taking the 66 cent rate for mining, which was in effect from about April, 1903, to June, 1907, if we had worked the mines to about full capacity, we could have put the coal on the cars for about 81 cents.

Mr. Roads: That includes royalty, does it?

Mr. Davis: Yes, sir.

Mr. Roads: And any estimate for timber?

Mr. Davis: Yes, sir.

Mr. Roads: What did you estimate for timber and royalty?

Mr. Davis: Royalty was 10 cents, and about 5 cents a ton for timber, etc.

Examiner Brown: That eliminates interest on the plant, and depreciation, repairs, and things like that?

Mr. Davis: Yes, it would cover—

Examiner Brown: You did not figure any interest on the plant or repairs or depreciation?

Mr. Davis: No, that is just the actual cost.

Mr. Roads: The loss per ton you figured there, based upon these figures, is $1.49. How did you arrive at that?

Mr. Davis: The difference in the average cost of production and the average selling price of coal made $1.49.

Mr. Roads: Assuming then that you had orders sufficient to keep your mine running at its full rated capacity of 560 tons per day, your total loss under those conditions would be $9,361.24, for that month, as you have stated here?

Mr. Davis: $9,351.24 I believe is the correct figure.

Mr. Roads: Now, state whether or not the entire sheet which you have in your hands has not been computed in the same way as you have testified to in regard to the item of July 26th, 1902?

Mr. Davis: That is the item for the month of July, 26 days. Yes, the whole thing is computed on that basis.

Mr. Roads: That is up to and including June 25th, 1907?

Mr. Davis: Includes the month of June. That is not the day of the month, but it is the month of June, and 25 working days.

Mr. Roads: Oh, I see, those are working days.

Mr. Davis: Yes, sir.

Mr. Roads: I offer the paper in evidence.

Mr. Gowen: We object on the ground that it is purely speculative, and estimate, not based upon any facts.

Mr. Roads: We would say that we will follow this up by proving the loss of contracts we have had cancelled by reason of the shortage of cars and discrimination in car supply on the part of the Pennsylvania Railroad Company, the defendant.

Examiner Brown: You may cross-examine on the paper, Mr. Gowen, if you desire.

Cross-examination.

Mr. Gowen: You do not wish to be understood as saying that during the period covered by this statement you have just been referring to, your shipments were limited by the supply of cars you received?

Mr. Davis: Generally.

Mr. Gowen: I did not ask you "generally". I say during the period?

Mr. Davis: Yes.

Mr. Gowen: Do you mean to say there were not periods here when you received all the cars you wanted?

Mr. Davis: Allow me to explain.

Mr. Gowen: Answer my question, and then you can explain. Were there not periods covered by this statement when you received all the cars you wanted?

Mr. Davis: Yes.

Mr. Gowen: Now, if you want to explain.

Mr. Davis: That came about because our men had gone away owing to not receiving cars when we could have worked.

Mr. Gowen: Do you mean to say that during the summer months of these years you were not receiving all the cars you wanted?

Mr. Davis: Not at all times.

Mr. Gowen: What summers do you except?

Mr. Davis: We were crippled at all times for want of cars, either directly or indirectly.

Mr. Gowen: What summers do you except from that statement?

Mr. Davis: Our books show that we are in need of cars at all times or if we had cars that we had not the men to load them on account of the fact that at periods our men left us because we had not the cars to work.

Mr. Gowen: I think Mr. Minds testified that there

were any number of men available for miners around this neighborhood.

Mr. Davis: Yes.

Mr. Gowen: That he could always get the miners when he wanted them. Is not that the case?

Mr. Davis: When we had work for them.

Mr. Gowen: If you had work for them?

Mr. Davis: Yes, sir; when we had work for them.

Mr. Roads: You understand, Mr. Gowen, that I had not finished with the witness.

Mr. Gowen, No, I thought you had.

Mr. Roads: No, I thought you were examining on that paper.

Examiner Brown: The paper will be received and marked in evidence.

(Paper received and marked Complainant's Exhibit No. 2 of this date.)

Examiner Brown: Proceed with your direct-examination, Mr. Roads.

Direct-examination (resumed).

Mr. Roads: Now, Mr. Davis, state whether or not, owing to the shortage of cars you were compelled to cancel orders for coal?

Mr. Davis: Yes.

Mr. Roads: Orders, I mean, which were accepted?

Mr. Davis: Yes.

Mr. Roads: Now, have you made a tabulated statement covering that point?

Mr. Davis: I have.

Mr. Roads: Referring to paper entitled "Number of cars short to fill orders on our books and cars lost account of cancelled orders". Is that the paper you refer to?

Mr. Davis: Yes, sir.

Mr. Roads: Well, that covers what period?

Mr. Davis: July, 1902, to June, 1907.

Mr. Roads: How did you make that up, for instance, take the item under July, 1902, referring to 19

cars short and 29 cars cancelled. Explain how you made that up?

Mr. Davis: I secured that from the shipping book of orders entered for shipment.

Mr. Roads: Have you the shipping books here?

Mr. Davis: Yes, sir.

Mr. Roads: Turn to your shipping books and show just what that record is based on.

Mr. Davis: It refers to the various orders as covering the 19 cars. First is Ashley & Shaw Silk Company, Phillipsburg, N. J., for one car, order taken May 5th. That was one car every 20 days. There were three cars, at that time, due at the close of July on that order.

Mr. Roads: You are giving the consignee, aren't you?

Mr. Davis: Yes; another one is Asher Brakeley, Bordentown, N. J. That was three cars we lost. Joseph Brakeley, Freehold, N. J., one car per week. At the close of July we were three cars short to fill that order.

Examiner Brown: How long does that order run?

Mr. Davis: It ran with us until it was cancelled, I understood from the correspondence.

Examiner Brown: When you made the contract for 100 tons every three days, what was the contract, that it was to run for one year, or two years, or for what length of time?

Mr. Davis: Contracts were taken generally for one year, and some of these were little local orders sent to us if we could fill them. We were unable to undertake contracts because we could not guarantee to fulfill the contracts.

Examiner Brown: So when you entered in your books that this company had sent you an order for 100 tons every three days, that was a standing order, you understood, for one year?

Mr. Davis: We had no written contract. I take it

that if we had the three cars which we were short, they would have accepted them.

Mr. Roads: The order was, as I understand, good until countermanded, until forbid?

Mr. Davis: Yes, sir.

Mr. Roads: Proceed.

Mr. Davis: Under the second item cancelled, Rising Sun Brewing Company, of Elizabeth, N. J., for three cars. That order on the 11th of July was cancelled, and there was two cars due on it. Breidt Brewing Company, Elizabeth, N. J., for three cars, two cars due yet on that, and it was cancelled on the 7th of July. We have then an order taken from the Breidt Brewing Company, Elizabeth, for one gondola weekly. The four cars due at that time and on the 7th of July the order was cancelled. New Jersey Iron Mining Company, Port Orange, N. J., for 75 tons. We had shipped one car, and were one car short at the end of the month. Hygeia Ice Company, Plainfield, N. J., one car, cancelled.

Mr. Roads: Are you including in that any Pennsylvania orders that were cancelled?

Mr. Davis: No, sir.

Mr. Roads: They are all interstate orders?

Mr. Davis: Yes, sir.

Examiner Brown: That is the method you pursued in making that table?

Mr. Davis: Yes, sir.

Examiner Brown: I think that is sufficient.

Mr. Roads: And the reason those cancellations were made was because of what?

Mr. Davis: Because of insufficient cars to fill them.

Mr. Roads: I offer this sheet in evidence.

Examiner Brown: If there is no objection the paper will be received in evidence and marked.

(There being no objection the paper was received in evidence and marked Complainant's Exhibit No. 3 of this date.)

Mr. Roads: You have a number of references here, I notice, by letters to footnotes on that sheet. Referring to "E" under date of 1905, June, cancelled nothing, zero you have after that. In the footnote there is the following: "Had orders from Bulah Shaft Coal Company, New York, for Amboy". Explain that entry.

Mr. Davis: We had orders on our books to ship all surplus coal to South Amboy.

Examiner Brown: Tidewater?

Mr. Davis: Yes, sir.

Mr. Roads: Can you lay your hands on that order from the Bulah Shaft Coal Company?

Witness produced shipping book of Bulah Coal Company and refers to page 31 containing an entry, "1905, June 13th, Bulah Shaft Coal Company, South Amboy, N. J."

Those figures are what?

Mr. Davis: Numbers of cars. We were able to get 13 cars shipped that month. Before the order was cancelled we got that many off our line, and got that many to South Amboy.

Mr. Roads: What period of time was covered by this order of Bulah Shaft Company, South Amboy, N. J.?

Mr. Davis: It was an order to stand until cancelled.

Mr. Roads: Now, by reference to the letter "z", in a number of instances you refer to the footnote. Will you explain that, please?

Mr. Davis: We had orders then from Potts & Company to ship all coal to South Amboy.

Mr. Roads: Those are the mine shipments, or the business covering these various months, are they?

Mr. Davis: Yes, sir.

Mr. Roads: Showing orders that you had received, and that you could not fill by reason of shortage of car supply?

Mr. Davis: Yes, sir.

Mr. Roads: What have you to say about "y"?

Mr. Davis: Had orders from Whitney & Kemmerer to ship all separate cars to West Albany, N. Y.

Mr. Roads: Will you turn to the books and show us where you have those orders from Whitney & Kemmerer?

Witness refers to ledger under date of 1903, February 2nd, Whitney & Kemmerer, West Albany, Transfer, N. Y.

Those are car numbers?

Mr. Davis: Yes, sir.

Mr. Roads: What have you to say in regard to that order, what was the character of that?

Mr. Davis: It was an open order for all cars we had to spare on it.

Mr. Roads: Accepted and entered?

Mr. Davis: Yes, sir.

Mr. Roads: Is the fact that they are entered on the books evidence of their acceptance by the Bulah Coal Company?

Mr. Davis: Yes, sir.

Mr. Roads: How about "o", January, 1903?

Witness refers to the same book, page 7, under date of 1903, William J. Fox, Holyoke, Mass.

What is the character of that order?

Mr. Davis: Open for all shipments.

Mr. Roads: How about "a", October, 1902?

Mr. Davis: An order from William J. Fox, for Newark, N. J.

Mr. Roads: You are reading from ledger under date of 1902, October 31st?

Mr. Davis: Yes, sir.

Mr. Roads: Is that of the same character as the other orders?

Mr. Davis: Same character, yes, sir.

Mr. Roads: Good until forbidden?

Mr. Davis: Yes, sir.

Mr. Roads: Referring to the letter "x", under

date of July, August, September and October, 1902, what about that?

Mr. Davis: That order goes right on through the various months.

Mr. Roads: What order does that letter "x" refer to?

Mr. Davis: Refers to orders from Whitney & Kemmerer, ship all separate coal to South Amboy. Here is the order, it stayed open for months.

Mr. Roads: The witness refers to the same book, November, 1902, Whitney & Kemmerer, South Amboy, N. J. You had made a number of shipments during that month?

Mr. Davis: Yes.

Mr. Roads: Those numbers are car numbers?

Mr. Davis: Yes.

Mr. Roads: Who was the agent for Whitney & Kemmerer?

Mr. Davis: Mr. Jacobs is the one we had our orders from as a rule.

Mr. Roads: This last number "x" November, 1902.

Witness refers to the same book, page 40, under date of November, 1902, Whitney & Kemmerer, West Albany, Transfer.

Was that same thing true of that order?

Mr. Davis: Yes, sir.

Mr. Roads: Can you tell us from your books what price was fixed for the W. & J. Fox coal orders?

Mr. Davis: The price is entered on the books.

Mr. Roads: How much? It was in October, 1902.

Mr. Davis (after referring to book): $3.15 a ton.

Mr. Roads: What was the character of that order as to what coal was to be taken? You have here a standing order from W. J. Fox, Newark, N. J., all surplus coal at $3.15. Where did you get that statement that all surplus coal is to be embraced in that order at $3.15?

Mr. Davis: Any car that could be loaded to go to Newark, N. J., at that time.

Mr. Roads: Was that surplus coal?

Mr. Davis: Any surplus we had over our line shipments. We had contracts.

Mr. Roads: Where is the evidence of that, where is the order—where did you get that order?

Mr. Davis: That came from W. J. Fox, Philadelphia.

Mr. Roads: Was it by correspondence or how?

Mr. Davis: It came in the form of an order.

Mr. Roads: Have you that order here in Court?

Mr. Davis: Yes, sir.

Mr. Roads: Among your slips?

Mr. Davis: Among my slips, yes, sir. Pardon me, this order came through Schillingsford, at Osceola, by 'phone.

Mr. Roads: As I understand, all of these cancellations represented on this sheet to which you have just been referring, were necessitated by reason of shortage of cars that you could not fill the orders, and consequently had to cancel them?

Mr. Davis: Yes, sir.

Mr. Roads: Now, I wish you would produce the orders—have you those cancelled orders in Court here?

Mr. Davis: Among my papers.

Examiner Brown: Unless Mr. Gowen raises some objection about them, I do not think there is any reason for going into that.

Mr. Gowen: I expect to cross-examine the witness on that. We do not by any manner of means admit that the full story has been told.

Examiner Brown: If you are ready to admit that he has some kind of an order, why he need not produce them. You could not give that last order because it was telephoned?

Mr. Davis: It was not cancelled. It was left open to fill.

Mr. Roads: Just give your orders beginning with the year 1902.

(Mr. Davis produced a bundle of papers and handed same to counsel.)

Mr. Roads: Have you got these orders in order?

Mr. Davis: Each year is kept together.

Mr. Roads: Year by year?

Mr. Davis: Yes.

Mr. Roads: And those are the orders the company had for coal which were cancelled for the reason stated, for want of cars?

Mr. Davis: Yes, sir.

Mr. Roads: We produce them in Court.

Examiner Brown: Let them be submitted to Mr. Gowen.

Mr. Roads: You have them year by year here in Court?

Mr. Davis: Yes, sir.

Mr. Roads: Between the year 1902 and 1907?

Mr. Davis: Yes, sir.

Mr. Roads: Now, Mr. Davis, state whether or not you did not have other orders covering this period which you did not accept?

Mr. Davis: Yes.

Mr. Roads: For what reason—what was the main reason, generally speaking, why you refused orders from good people and from your own customers?

Mr. Davis: We had not the cars to fill them.

Mr. Roads: Can't you tell us the proportion of orders from your customers and others which you refused because of shortage in car supply, for fear that you could not fill them—what proportion, in comparison with your total shipments?

Mr. Davis: No, I could not give that.

Mr. Roads: Was it a substantial amount of business compared with your business that you did do?

Mr. Davis: Yes.

Mr. Roads: Could you state whether it was as

much as 25 per cent. or could you put it in the shape of percentage?

Mr. Davis: I could not put in the shape of percentage.

Mr. Roads: A large or substantial part—there were a substantial number of cars covering this period that the company refused because of the fear that they could not have a car supply sufficient to make the shipments.

Mr. Davis: Well, the orders would not come to us. They would write and ask if we would take more business, and of course we would have to refuse it. We did not get a volume of it. We knew that we had orders that were not being filled promptly.

Mr. Roads: Did that happen often?

Mr. Davis: Yes, sir.

Mr. Roads: Was it a substantial part of your business that you lost for that reason?

Mr. Davis: As a general thing, yes.

Examiner Brown: Is it your contention here, Mr. Roads, that there is any provision in the Act to Regulate Commerce upon which the Commission can make an order with reference to the obligations of a common carrier to supply facilities—

Mr. Roads: I do not quite understand.

Examiner Brown: I am speaking of the latter part of Section 1 of the Act—I do not quite understand the contention of your pleadings—it says here: "And it shall be the duty of every carrier subject to the provisions of this Act, to provide and furnish such transportation, upon reasonable request therefor, etc." Now, is it your contention there is any power, in the Act to Regulate Commerce, given to the Commission to make an order carrying into effect that provision.

Mr. Roads: There is no question raised here. This petition is filed for the purpose of fixing and recovering damages.

Examiner Brown: That is, for reparation?

Mr. Roads: For failure of the defendant company

to perform the duty devolved upon it by virtue of the Section.

Examiner Brown: That is the point I am making. Of course there is the common law liability which the railroad company is under to its patrons. The Commission has no jurisdiction, I assume, outside of the terms of the statute, and I want to know if it is your contention that the Commission has any power to make an order.

Mr. Krebs: Only where there has been discrimination.

Mr. Roads: Section 16, which is as follows: "That if, after hearing on a complaint made as provided in Section 13 of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named." And there follows the provision with reference to the day in court the other side may have, etc.

Examiner Brown: Proceed.

Mr. Roads: Now, Mr. Davis, where did you live with reference to Eureka No. 7 operation, and the office of the Bulah Coal Company?

Mr. Davis: I lived in Ramey.

Mr. Roads: In going to and from your work, state whether or not you pass the Eureka No. 7?

Mr. Davis: I do.

Mr. Roads: Is their tipple near the public road?

Mr. Davis: Yes.

Mr. Roads: How near?

Mr. Davis: About 40 feet, I suppose, from the street.

Mr. Roads: State whether or not in going to and from your work you crossed the siding—is there a siding there at the tipple?

Mr. Davis: Yes, sir.

Mr. Roads: What is the number, do you know?

Mr. Davis: No. 7, Eureka No. 7.

Mr. Roads: In passing up and down there, did you count the cars on the siding at the Berwind-White Coal Company's operation at any time after 1902, say September?

Mr. Davis: Yes, sir.

Mr. Roads: How often would you go up and down there?

Mr. Davis: Morning and evening.

Mr. Roads: Have you got a statement of the number of cars and the character of the cars that were on the siding at Berwind-White Coal Company's No. 7 operation?

Mr. Davis: Yes.

Mr. Roads: Have you got the number of the cars?

Mr. Davis: Yes, sir.

Mr. Roads: Did you count those cars continuously, or did you do it intermittently?

Mr. Davis: I took the numbers and initials and capacity of the cars September 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 23d, 25th, 27th, 29th, November 5th, 6th, 10th, 11th, December 27th.

Mr. Roads: It is all set out on a statement?

Mr. Davis: Yes, sir.

Mr. Roads: Was that statement made up by you?

Mr. Davis: Yes, sir.

Mr. Roads: From the data that you made at the time you counted the cars?

Mr. Davis: Yes, sir.

Mr. Roads: Have you the data that you made at the time you counted the cars before you now?

Mr. Davis: I have.

Mr. Roads: And that statement is made up from the data in a book produced in court here, a small book?

Mr. Davis: Yes, sir.

Mr. Roads: Referring to the date, April 17th, 1905, down to April 19th, 1905, you have an entry there, "Siding full of cars." Have you got any other entry besides that in reference to the cars standing at Eureka No. 7 as of that time?

Mr. Davis: I don't understand the question.

Mr. Roads: You say here simply this, under date of April 15th, 1905, "Siding full of cars." "April 18th, ditto; April 19th, ditto."

Mr. Davis: No, I took no numbers during those three days.

Mr. Roads: Now, from the 21st down to the 28th you say, "Siding full of cars, and working full time." That refers to Eureka No. 7?

Mr. Davis: Yes, sir.

Mr. Roads: How often during those days did you see the siding full of cars?

Mr. Davis: Twice a day.

Examiner Brown: What date is that?

Mr. Roads: That is April 21st, 1905.

Examiner Brown: Was that during the operation of those mines?

Mr. Roads: It is Eureka No. 7, in favor of which we claim there has been discrimination. We laid the ground for that in the early part of the case by Mr. Minds' examination. (Addressing the witness) State whether or not you have a car record of the cars supplied to Bulah Coal Company at Webster No. 4 Colliery by Pennsylvania Railroad, covering the same date?

Mr. Davis: Yes, sir.

Mr. Roads: On the right-hand side of the sheet is that, and on the left is the data covering the car supply as you found it by personal count on the same dates?

Mr. Davis: Yes, sir.

Mr. Roads: Where did you get that data?

Mr. Davis: From my own records of cars received each day.

Mr. Roads: Have you got that car book in court?

Mr. Davis: Yes, sir (producing a book).

Mr. Roads: What are these books you have produced?

Mr. Davis: Books of record of cars received and loaded each day.

Mr. Roads: That record shows what, the numbers of the cars?

Mr. Davis: The numbers of the cars, the initials and the capacity.

Examiner: And your table is made up from those?

Mr. Davis: Yes, sir.

Mr. Roads: This table is gotten up for what purpose, Mr. Davis?

Mr. Davis: To show a comparison of cars received on even dates by Eureka No. 7, operated by Berwind-White Coal Mining Company, and Webster No. 4, operated by Bulah Coal Company.

Mr. Roads: That is for the purpose of showing discrimination in the car supply between Eureka No. 7 and Bulah Coal Company's Webster No. 4, on these same dates?

Mr. Davis: Yes, sir.

Mr. Roads: Were these dates especially selected or not?

Mr. Davis: No.

Mr. Roads: I offer in evidence a statement entitled "Cars received at B-W C. M. Co.'s Eureka No. 7," and "cars received at Bulah Coal Co.'s Webster No. 4 Colliery."

Examiner Brown: Let it be received and marked, if there is no objection.

(There being no objection, the paper was received in evidence and marked Complainant's Exhibit No. 4 of this date.)

Examiner Brown: What was the rating of Webster No. 4?

Mr. Roads: Sixteen cars a day.

Examiner Brown: And Eureka No. 7, 14 cars?

Mr. Roads: Yes. (Addressing the witness) Did you make requests for car supply?

Mr. Davis: Yes.

Mr. Roads: Now, confining yourself to the period from 1902 to 1907, I wish you would tell us generally the method of your getting the cars, of your making requests, what efforts you made in order to get the company to give you the number of cars for which the mine was rated?

Mr. Davis: Daily requests by their method, whatever they laid out for us, for cars, daily.

Mr. Roads: How was that done?

Mr. Davis: There was a while we had to do it by mail, by written order to the Superintendent's office at Tyrone. At another period we had to do it by telephoning the order to the Houtzdale station.

Mr. Roads: Did they change the method?

Mr. Davis: Yes.

Mr. Roads: What was the new method for ordering the cars?

Mr. Davis: I just stated we would send written orders, and then they would tell us to order them by telephone at the Houtzdale station. Then the method was to leave an order at Madera Junction. They have an operator there. Then at other times they required us to send orders to Osceola to the Train Dispatcher's office.

Mr. Roads: Who required you to pursue that method?

Mr. Davis: The railroad company.

Mr. Roads: Did you make complaints that you were not receiving your allotment of cars as early as 1902?

Mr. Davis: Yes.

Mr. Roads: What efforts did you make in order to get the company to send you that allotment—were you rated prior to 1906?

Mr. Davis: We never knew anything about the rating.

Mr. Roads: So far as you know, was that the custom in this vicinity, that the company did not publish the rating on car allotment for the various operations?

Mr. Davis: I never saw any.

Mr. Roads: And you did not know then, as I understand it, prior to 1906 what the company rated Webster No. 4 at?

Mr. Davis: No.

Examiner Brown: Did they ever tell you how many cars you were entitled to?

Mr. Davis: No.

Mr. Roads: The first published rating then, as I understand it, was in 1906?

Mr. Davis: Yes.

Mr. Roads: Now, as early as 1902, I understand you to say you complained about not receiving a car supply sufficient to handle the output capacity of the mine?

Mr. Davis: Yes, sir.

Mr. Roads: How persistent were your efforts in that direction, and what did you do?

Mr. Davis: There were times when we called them up by telephone daily, urging them to give us more cars.

Mr. Roads: What reason did they give you for not giving the cars?

Mr. Davis: They would often say that they did not have them.

Mr. Roads: Were you idle when No. 7, Eureka No. 7, was working, in 1902, at times?

Mr. Davis: At times, yes, sir.

Mr. Roads: In what proportion, can you say?

Mr. Davis: Well, the data just turned in there gives the number of cars that we should have received, and the number we did receive.

Mr. Roads: That is not continuously. That is only at the times for which it speaks and the dates for

which you have the entires. I want to know, continuously, from 1902, whether the same condition did not prevail, generally, that Eureka No. 7 worked substantially full time, as compared with your working part of the time, because of the shortage of cars to you?

Mr. Davis: They did.

Mr. Roads: Have you correspondence in regard to that with the officials of the railroad company—in regard to car supply?

Mr. Davis: I have.

Mr. Roads: Will you produce it, please, starting with Mr. Blair, the Superintendent of the Tyrone Division.

Mr. Davis: In regard to S. S. Blair, the correspondence, I believe, is in Philadelphia.

Mr. Roads: Well, who is the next official you had communication with?

Mr. Davis: J. K. Johnston.

Mr. Roads: Who is he?

Mr. Davis: Superintendent of the Tyrone Division now, and has been for a number of years.

Mr. Roads: Produce that correspondence, please.

(The witness produced papers and handed same to counsel.)

Mr. Roads: Are these letters in order?

Mr. Davis: It is a short correspondence. I called Mr. Freeman by 'phone.

Mr. Roads: You produce a letter here dated December 17th, 1904. Haven't you letters prior in date to that?

Mr. Davis: That correspondence is in Philadelphia, as I have said.

Mr. Roads: Who has it?

Mr. Davis: In Mr. John H. Minds' office.

Mr. Roads: Why it is not here, is it on its way here?

Mr. Davis: I suppose it is, if Mr. Minds is able to get it and send it.

Mr. Roads: Mr. Minds is sick in the hospital?

Mr. Davis: Yes, sir.

Mr. Roads: He is a son of one of the complainants, Mr. James H. Minds?

Mr. Davis: Yes, sir.

Mr. Roads: He is a member of the Philadelphia bar, is he not?

Mr. Davis: Yes, sir.

Examiner Brown: There need not be any trouble about that. Your opponents have the originals, and any time you can get them you can file them in the case. I have no doubt that they have received them, and I have not any doubt that Mr. Gowen will admit that they received numerous letters from your company, asking that they be supplied with cars.

Mr. Gowen: I don't know, I suppose so. If there is anything to be put in, we will furnish that.

Mr. Roads: You have produced a letter dated December 16th, 1904, signed by James H. Minds, addressed to Mr. R. M. Patterson, Superintendent Freight Transportation, Philadelphia, Pa., as follows:

"Dear Sir:—

We are not receiving many cars, and our Bulah Coal Company cars are not being returned very promptly, so you see by this the amount of trouble we are having with our customers, as we cannot ship them their coal when we do not have the cars. Will you kindly remedy this for us by seeing to it that we receive a better supply of Pennsylvania System cars both steel and wood, and that our own cars be promptly returned, and oblige,

Yours truly,

JAMES H. MINDS,
Superintendent."

The answer is:

December 17th, 1904.

James H. Minds, Superintendent.

Dear Sir:—

Referring to your letter of December 16th, we

are endeavoring to increase the supply of cars to the different regions, and we will move up the Bulah Coal Company cars as promptly as possible, but we are having troubles on the main line which interfere with the movement very materially.

Yours truly,

R. M. PATTERSON,

Superintendent of Freight Transportation."

Mr. Roads: I offer in evidence these letters in connection with the other correspondence already offered in the case, to show that demands and frequent requests were made on the part of the complainant.

Examiner Brown: They can all be introduced, and then if there are any you wish especially to read into the record you can do so.

Mr. Roads: Mr. Davis, what was the effect on the miners going to work in case the delivery of cars was delayed at Webster No. 4, when they were put in at a late hour in the day?

Mr. Davis: The miners would wait a certain time, say half an hour, and if the cars were not there, they would go home.

Mr. Roads: Was that the usual thing with the miners?

Mr. Davis: Yes, sir.

Mr. Roads: Referring to the memorandum here under date of June 16th, 1902, did you make a memorandum of instances of that kind where there was a delay in the delivery of cars, in there being run in in the morning or in the course of the day, and how it affected the operation of the plant, and how it delayed the loading?

Mr. Davis: Yes, sir.

Mr. Roads: Did you make the memoranda at the time?

Mr. Davis: At the time.

Mr. Roads: And have you that memoranda before you?

Mr. Davis: I have.

Mr. Roads: Under date of June 16th, 1902, referring to that, tell us what occurred in reference to that subject at that time?

Mr. Davis: June 16th, waited and held our men one hour this morning waiting for P. R. R. Company to push cars in on siding.

Mr. Roads: Held them from what time.

Mr. Davis: We had two cars at the tipple, and after loading them we remained idle for an hour before the cars were pushed in. They were set off at Vulcan while the freight would go down and branch to Madera and intermediate points and push the freight back.

Mr. Roads: Explain that again, the method that the Pennsylvania Company pursued.

Mr. Davis: When they brought a train of cars to Madera Junction—

Mr. Roads: Which direction is Madera Junction from Webster No. 4?

Mr. Davis: Going towards Houtzdale and Osceola.

Mr. Roads: What direction?

Mr. Davis: Northeast.

Examiner Brown: As I understand this line runs up from Osceola and then there is a branch that runs to Eureka No. 7, and one to Webster No. 4?

Mr. Roads: Eureka No. 7 is on that branch, and there is a siding there. (Addressing the witness) Now, then, when a train of cars comes up from Osceola just describe the method of the company in distributing the cars on that trip?

Mr. Davis: When they reached Madera Junction, our cars were set off.

Mr. Roads: Coming up the branch, what operation did they first come to?

Mr. Davis: Eureka No. 7 is right near this junction point and they placed Eureka's cars—

Mr. Roads: The empties?

Mr. Davis: Empty cars, and would go on down the line toward Madera.

Mr. Roads: Is that past Webster No. 4?

Mr. Davis: Past our branch, that goes by Webster.

Mr. Roads: How far do they continue on to Madera? Go on and describe that.

Mr. Davis: After setting off these few cars for us at the branch, at the Madera Junction, they go down to Madera and place cars down there and return with loads to the top of the hill, the junction, and then push our empties in.

Examiner Brown: While they were up there with the load your cars were on the siding?

Mr. Davis: Yes, sir.

Mr. Roads: What siding was that?

Mr. Davis: The Junction siding at the top of the hill.

Mr. Roads: It is not your siding at the tipple?

Mr. Davis: No, we are out on a branch.

Mr. Roads: How far away from your tipple is that?

Mr. Davis: About half a mile.

Mr. Roads: After they came back from Madera, then it was that they ran in these empties on your siding, is that right?

Mr. Davis: Yes, sir.

Examiner Brown: If they did the same thing with Eureka No. 7 you weren't discriminated against?

Mr. Davis: They placed their cars after setting ours off, and then they would go on down and place ours afterwards.

Mr. Roads: When your cars were placed on Vulcan siding, they were not available to you?

Mr. Davis: No, sir.

Mr. Roads: But when cars were placed on Eureka No. 7 they were ready for that operation?

Mr. Davis: Yes, sir.

Mr. Roads: What time of the day would you get your allotment of cars by that operation?

Mr. Davis: Often eight or nine o'clock.

Mr. Roads: What time would Eureka No. 7 get theirs?

Mr. Davis: Along about seven o'clock.

Mr. Roads: Then there would be a delay of about two hours in the delivery at the two points?

Mr. Davis: Quite often we would have a part of a car to load and we would load that, the men would be on the inside, and we would hold them waiting until the cars came in.

Examiner Brown: Did you ever call the attention of the Pennsylvania Railroad Company's officials to this method of car distribution?

Mr. Davis: The man at the junction, we would call his attention to that. He said they did not have time.

Mr. Roads: What time would the men go to work?

Mr. Davis: Half-past six or seven o'clock.

Mr. Roads: What would be the result of the delay in that way on the men going to work?

Mr. Davis: Had to pay the company hands working about the mines for that hour when there was nothing to do.

Mr. Roads: Was this a steady or regular thing?

Mr. Davis: It occurred frequently.

Mr. Roads: How frequently, say?

Mr. Davis: Twice or three times a week.

Mr. Roads: Covering what time?

Mr. Davis: During all this time.

Mr. Roads: From 1902 to 1907?

Mr. Davis: Yes, sir.

Mr. Roads: As much as two or three times a week?

Mr. Davis: Yes, sir.

Mr. Roads: Say whether or not that would result in the men going home?

Mr. Davis: It would, if we had no cars to start on. Not if we had one or two cars in.

Mr. Roads: It frequently happened that the result of that method of delivery of cars would be that the men would not work that day, at least the miners would not go in, did it not?

Mr. Davis: They would not go in if we had no cars to start on.

Mr. Roads: Do you know whether the company charged the Bulah Coal Company for those cars as part of their allotment for the next day?

Mr. Davis: That is what the railroad men claimed that they were charged up to us, whatever was standing in the evening, as cars available for loading.

Mr. Roads: What have you to say in reference to the item or occurrence under date of June 18th, 1902?

Mr. Davis: Waited that morning from 7.45 to 9.00 o'clock for the railroad to push our cars in on siding, and then only got five P. & R. cars.

Mr. Roads: P. & R. cars?

Mr. Davis: Yes, Reading cars, foreign cars.

Mr. Roads: Is the same thing true of July 21st, 1902?

Mr. Davis: Yes, sir.

Examiner Brown: Is there a transcript of that record made here in the statement?

Mr. Roads: No, sir. These are individual instances, personal instances.

Examiner Brown: I did not know but what you had it tabulated.

Mr. Roads: There is a tabulation, but that refers to the books.

Examiner Brown: Very well, go ahead.

Mr. Roads: Now, take up these instances of which you have memoranda, the instances you have noted there.

Mr. Davis: Give me the date and the page.

Mr. Roads: Under date of July 23d, 1902, page 10 of your book.

Mr. Davis: Waited for P. R. R. Company to put

cars on side track, waited for one hour, they set off four P. R. R. cars at Vulcan, and went on down the run. When they came back—

Mr. Roads: Set them off at Vulcan?

Mr. Davis: That is the siding at this junction point. It is called Vulcan Branch.

Mr. Roads: Were those cars set off on Vulcan Branch available to your tipple?

Mr. Davis: No, sir.

Mr. Roads: Now, the next date is September 3d.

Mr. Davis: Telephone from S. S. Blair, asking for five extra cars for supply coal to stop at their stations along the line. Request granted by Mr. Minds.

Mr. Roads: That same thing is true, is it not, of September 8th, 19th, 29th and 30th?

Mr. Davis: The 'phone call is from Mr. Stein on the 30th, that is the only difference.

Mr. Roads: Take up March 31st, 1903, page 17.

Mr. Davis: March 31st, 1903, 10.00 o'clock A. M., Mr. Fred Vrooman 'phoned from Osceola Tower that they were holding Bulah Coal Company cars up as there was no arrangement yet with the P. R. R. for hauling said Beulah Coal Company cars, and that they were now holding car No. 445.

Mr. Roads: Go ahead, Mr. Davis, please, and take up the next item under date of February 16th, 1903.

Mr. Davis: I don't find that.

Mr. Roads: Take June 26th, 1903, page 17.

Mr. Davis: Railroad Company set off at Madera Junction five line cars and three B. C. Company cars at 7.55 this morning for Webster No. 4, but No. 4 did not start, so these five line cars were placed on Eureka No. 7 siding and loaded by Berwind-White Coal Mining Company. On June 27th three B. C. Company cars were, with one other B. C. Company car, placed on our siding at 7.40 A. M., stating that they did not have five other cars to give us this morning, that they were taken to Berwind-White's.

Mr. Roads: August 4th, 1903, what occurred then?

Mr. Davis: August 4th, 1903, cars Nos. 3659 P. & N. W., 49334 P. R. R., 59259 P. R. R. 22631 P. C. C. & St. L., 35131 P. R. R. placed on Vulcan Branch about noon, not put on our side track until August 6th at about 10.00 A. M. We had to wait over an hour for these cars after loading a couple of Bulah cars in the meantime.

Mr. Roads: These cars, accoring to that, laid there on Vulcan siding for two days?

Mr. Davis: Yes, sir.

Mr. Roads: November 12th, 1903?

Mr. Davis: Cars P. R. R. 59949, 46354, B. C. Co. 499, were placed on Vulcan Branch at Madera Junction on afternoon of November 11th, not put on our siding until 3.30 P. M. on the 12th. We were idle on the 12th by not having these cars.

Mr. Roads: What is the distance from that Vulcan siding, did you say, up to your tipple siding?

Mr. Davis: About half a mile, a little over, possibly.

Mr. Roads: Then you were idle on account of that fact, that these cars were run on this Vulcan Siding on the 11th and were not brought up to you until the 12th, and the distance is about half a mile?

Mr. Davis: About half a mile.

Mr. Roads: And then not until 3.00 o'clock in the afternoon of the 12th?

Mr. Davis: 3.30.

Mr. Roads: November 17th, 1903, what occurred then?

Mr. Davis: November 17th, 1903—referring back to November 11th, we shipped seven cars to F. C. Shuey, South Amboy, and on November 13th, one car to F. C. Shuey, to South Amboy, making eight cars in all. These eight cars were held at Tyrone scales until November 17th. We received no notice of such holding except by Mr. Wingate talking with Mr. Minds he said

he saw a message at Osceola to the effect that those eight cars were held, so at 10.00 o'clock today, being the 17th, I called Hughes at Osceola tower and asked about it. Hughes said these eight cars were held on account of having no permission to allow these eight cars to go forward.

Mr. Roads: Was there ever any explanation made as to why those eight cars were detailed at Osceola?

Mr. Davis: No.

Mr. Roads: December 17th, 1903, what have you there for that date?

Mr. Davis: Four steel cars, Nos. 21427, 56677, 130245 and 59766, loaded and manifested December 15th, A. M., was not taken out from our siding until December 17th, A. M.

Mr. Roads: State whether the freights passed up and down there during that time?

Mr. Davis: Yes, sir.

Examiner Brown: Did you get any other cars in the meanwhile?

Mr. Davis: That was on the 15th. We were idle on the 15th, 16th, 17th and 18th.

Mr. Roads: December 30th, 1903, tell us if you have an occurrence there, and what it was.

Mr. Davis: December 30th, 1903, at 2.50 P. M. freight put in three B. C. Co. cars Nos. 483, 478 and 499. These cars stood on Vulcan Branch since December 30th, and we were without cars, and when they did come in they only took out two loads and left the balance of the loads.

Mr. Roads: Was there any explanation of why that was done, why they took out part of the cars, and left part of them standing?

Mr. Davis: Yes, the only excuse they ever gave was that they had not time.

Mr. Roads: January 4th, 1904.

Mr. Davis: January 4th, 1904, at 3.00 o'clock P. M., freight took out cars 9081 Penna. Company, that

had been loaded and manifested December 30th, 1903, and B. C. Co. car 487, that had been manifested December 31, 1903.

Mr. Roads: When were they taken out on the siding?

Mr. Davis: I just gave the dates, January 4th, 1904.

Mr. Roads: And all that time they laid there loaded?

Mr. Davis: Loaded and manifested.

Examiner Brown: What do you mean by manifested?

Mr. Davis: Card made out for shipment, showing destination and consignee.

Examiner Brown: To whom did you hand that, the conductor?

Mr. Davis: When he came in for the cars.

Examiner Brown: Where did you make that, in your office?

Mr. Davis: Yes, sir. It is a card for them, showing the destination and consignee.

Examiner Brown: You afterwards received a bill of lading?

Mr. Davis: No, the bill of lading follows the car to destination.

Mr. Roads: Was this delay caused in any way by your not doing anything that was necessary to be done?

Mr. Gleason also read from the record of the Interstate Commerce Commission the following testimony, appearing at page 125:

Mr. Roads: As I understand, you had uncancelled orders to load nineteen additional cars, and that number of cars was not furnished you by the company?

Mr. Davis: Yes, sir.

Mr. Roads: Now, in addition to that, you had an order as indicated by the character "x" preceding the numbers under the column short—you had orders from Whitney & Kemmerer to ship all separate coal to Amboy?

Mr. Davis: Yes, sir.

Mr. Roads: So that the effect of the treatment you received, as indicated by this schedule where it is marked "x" was that you had to cancel orders which would have required the number of cars set out in the cancelled column. You had, in addition, a shortage of the number of cars indicated, to wit, under the entry of July, 1902, nineteen cars short of those that were still uncancelled, and you lost, in addition, by the shortage of car supply, the opportunity to fill the order of Whitney & Kemmerer to ship all surplus coal to Amboy, N. J.?

Mr. Davis: Yes, sir.

Mr. Roads: That general statement holds good in regard to all these characters on this sheet?

Mr. Davis: Yes, sir.

Mr. Roads: Mr. Davis, have you got the books here from which you can tell us the number of full days worked during the years from 1902 to 1907 inclusive?

Mr. Davis: Yes, sir.

Mr. Roads: Produce them, please.

(Witness produced books.)

Mr. Roads: What do you call that book?

Mr. Davis: This is compiled from our car book where we keep the cars received, cars shipped, and the time the mine worked.

Mr. Roads: Can you tell us what portion of the day, for instance, the mine was worked during the entire year of say 1902?

Mr. Davis: Yes, sir.

Mr. Roads: Was that book kept by you?

Mr. Davis: Yes, sir. I have the book here.

Mr. Roads: Is that the book of original entries in regard to this, kept by you each day?

Mr. Davis: Yes, sir.

Mr. Roads: Referring to the year 1902, November 1st, tell us just on that first column what those figures mean, showing the method or how you kept that time?

Mr. Davis: November 1st, four cars loaded, total of four cars in the month; time worked one-fourth day. Did not work any then until the 3d, seven cars, making a total of eleven cars for the month, worked three-fourths of a day.

Examiner Brown: And from that you made up this statement?

Mr. Davis: Yes, sir.

Mr. Roads: Every day you kept that record, showing the time that the operation worked?

Mr. Davis: Yes, sir.

Mr. Roads: From day to day, covering the entire year of 1902, and you have that book before you?

Mr. Davis: Yes, sir.

Mr. Roads: From that book did you compile that data into another one?

Mr. Davis: Yes, sir.

Mr. Roads: What do you call that book?

Mr. Davis: That is the data book.

Mr. Roads: That book you have before you in Court?

Mr. Davis: Yes, sir.

Mr. Roads: Now tell us, what portion of the day —in other words, state whether or not you worked one full day in the year 1902?

Mr. Davis: No, worked no full day.

Mr. Roads: Can you tell us the average portion of the day or not?

Mr. Davis: I have not the total of the various fractions of days worked. I have the total of the year.

Mr. Roads: This refers to working days?

Mr. Davis: Working days. I do not just understand what you wish.

Mr. Roads: I want to know, if you can tell us, what proportion of the day the average was for the whole year?

Mr. Davis: The most any one day we worked was three-quarters of a day during the year 1902.

Mr. Roads: What was the occasion of that?

Mr. Davis: The lack of cars.

Examiner Brown: What do you call a day, how many hours?

Mr. Davis: At that time a ten-hour day.

Examiner Brown: Out of a possible ten-hour day you worked not to exceed an average of three-quarters of a day?

Mr. Davis: No, not the average. The longest day we worked during that year was three-quarters of a day.

Examiner Brown: What was the average for the year?

Mr. Davis: I don't know the average. We worked quarters and halves.

Examiner Brown: How many days did you work in the year all told, have you got that?

Mr. Davis: Yes, sir. For the year 1902 a total of 139¼ days, counting three fractions.

Examiner Brown: Out of a possible 312 days you worked 139¼ days?

Mr. Davis: Yes, sir.

Mr. Roads: Can you tell us readily how many days in the year you worked but half time? Could you do that readily—or quarter time, for instance—the number of times, the number of days?

Mr. Davis: I can give it monthly.

Mr. Roads: Well, give it to us that way.

Mr. Davis: January, worked eleven three-quarter days, eleven half days and three quarter days. February eleven three-quarter days, three one-half days, five quarter days. March two three-quarter days, nine half days and six quarter days.

Mr. Roads: Is that about a fair sample of how it runs throughout the year?

Mr. Davis: Yes, that is about the way it ran on along.

Mr. Roads: Give us the first six months, carry it on through to July 1st.

Mr. Davis: April eleven one-half days and seven quarter days. May ten three-quarter days, twelve one-half days and one one-quarter day. June fifteen three-quarter days, seven one-half days and two one-quarter days. July sixteen three-quarter days, six one-half days and three one-quarter days. August twelve three-quarter days, eight one-half days and four quarter days. September six three-quarter days, nine one-half days and four one-quarter days. October sixteen three-quarter days, five one-half days and three one-quarter days. November two three-quarter days, four one-half days and eight one-quarter days. December four three-quarter days, eight one-half days and ten one-quarter days.

Mr. Roads: How many full days did you work in 1903?

Mr. Davis: We worked 33 full days.

Mr. Roads: In 1904, how many full days did you work, and follow that up year by year to the present time.

Mr. Davis: Thirty-eight full days in 1904; 1905, 34 full days; 1906, 26 full days.

Examiner Brown: I understand that these 26 full days are scattered over the year 1906 in different months?

Mr. Davis: Yes, sir.

Examiner Brown: But all added together that year amounted to only working 26 days?

Mr. Davis: Twenty-six full ten-hour days, besides fractions. I can give you the total for 1906. Do you want all these given?

Examiner Brown: No, I do not think that is necessary.

Mr. Roads: Where were you last, 1907.

Mr. Davis: No, 1906.

Mr. Roads: Finish that up for 1907 to July 1st?

Mr. Davis: 1907, to July 1st, worked 100 full days.

Mr. Roads: Out of a possible what number of days in the year—every day but Sunday?

Examiner Brown: It would be 312 days in the year.

Mr. Roads: Can you tell us how it comes that you worked 100 days for the first six months in 1907, as against the other number of full days that you worked for the years prior to that time?

Mr. Davis: We were working eight-hour days at that time and we had a very light force on on account of the supply of cars that we had, and it takes longer to load the cars given us.

Mr. Roads: State whether or not it was by reason of cars that were furnished you in the first six months of 1907 that you were enabled to work 100 days as against the number of days you worked prior thereto —was the car service better?

Mr. Davis: Not materially better. We were working a very light force, was the chief reason. I cannot say that the car supply was increased. It was perhaps more regular at that time."

Mr. Gleason also read from the record of the Interstate Commerce Commission the following extract from letter from Anthony P. Trump, General Superintendent of Transportation of Pennsylvania Railroad Company, appearing at page 254 thereof, as follows:

"Now, our average distribution is about as follows:

System cars for company coal, 21 per cent.

Foreign cars for supply coal, 6 per cent.

Individual cars, 45 per cent.

System cars for commercial coal, 25 per cent.

Foreign cars for commercial coal, 3 per cent.

Now, I assume that you are familiar with our method of distribution which deducts from the mine capacities before a prorate is made all cars which may be assigned to mines such as company coal cars and individual cars. This we consider proper and in as

much as these assignments are necessary the remainder constitutes the actual proratable capacity to which the general distribution of cars is applied."

Mr. Gleason also read from the record of the Interstate Commerce Commission the following, appearing at page 257:

"Mr. Krebs: Mr. Gowen spoke to me about Mr. Trump and Mr. Atterbury going away this evening. I do not believe that we will be able to close this case finally if they are going to offer testimony, or if we have got to get those sheets and summaries that we have spoken of.

Examiner Brown: This hearing does not depend upon the production of those sheets. You can get those out and send them to Washington any time. As I understand, some bookkeeper of the Coal Company, and some one representing the railroad company, the auditor of the Railroad, can get this information up and it can be submitted to you and Mr. Gowen or to Mr. O'Laughlin, and you can agree upon it, and send it to Washington where it will be filed with the papers in the case. We certainly cannot examine the books here, there is no opportunity. It would take all summer. We cannot do that.

Mr. Krebs: I think all the information we require in this case can be furnished from the Cresson office. If they will agree that after the adjournment here we may send an accountant to the Cresson office, and they will permit us to go over these sheets, rating and distribution sheets, we need not waste the time here.

Examiner Brown: There is no trouble about that, is there, Mr. Gowen?

Mr. Gowen: None.

Mr. Krebs: Then the same arrangement probably can be made later on as to the other case?

Mr. Gowen: I do not want the Judge to be too san-

guine as to how long it will take. Mr. Trump, how long have the Webster people been at our books?

Mr. Trump: Three months.

Examiner Brown: I think if you would take out of each year say a quarter, that will give you a basis for your argument.

Mr. Krebs: As I understand counsel in the other case, in which I am only assisting, agree that Mr. Trump may go—they subpoenaed him, I did not—if this testimony which was taken here can be considered as taken in all four cases.

Examiner Brown: That was the understanding, in the beginning. You are through with Mr. Trump?

Mr. Krebs: Yes, sir.

Examiner Brown: Is there anybody else you want to examine who wants to go away?

Mr. Krebs: I don't want to examine Mr. Atterbury. He was subpoenaed in the other case. I did not subpoena either one of these gentlemen. I know your Honor's anxiety to get away, and also your anxiety to work at night in order to accomplish that. I am hardly in condition to work at night.

Examiner Brown: Perhaps we can take up another case.

Mr. Krebs: Counsel in the other cases do not wish to detain Mr. Atterbury. At this stage they do not want to examine him. They are perfectly willing for him to go away now, and if the case at Harrisburg should be closed before we get through here we will telegraph or call him and ask him, if it is necessary for him to do so, to come back. As to the summary and the distribution sheets, as I understand, we will make the same arrangement in those cases that we have here.

Examiner Brown: Yes, sir.

Mr. Krebs: That can be done at Philadelphia, Mr. Trump?

Mr. Trump: Yes, sir.

Examiner Brown: If you do not want to go on tonight, Judge Krebs, do counsel in the other cases desire to take up either of those tonight?

Mr. Krebs: I think you will get away within the three days without any question, in view of the agreement about these sheets.

Examiner Brown: With the understanding that we will get through here by Wednesday evening, I will not hold an evening session."

Mr. Gleason also read from the record of the Interstate Commerce Commission the following, appearing at page 278:

"Mr. Roads: And we are to get the distribution sheets for the Moshannon district?

Mr. Gowen: You want to go over them yourselves?

Mr. Roads: We will be perfectly willing to accept the same arrangement you made in the other case.

Mr. Gowen: Just as you prefer.

Mr. Roads: It will be satisfactory to us. On the Moshannon Branch we want the car distribution sheets to Eureka No. 7 and Webster No. 4.

Mr. Trump: That we cannot give you because all the Eureka mines are consolidated together on all of our sheets. We could not give you No. 7 separated from the others, all these Eureka mines are consolidated under one operation. We have not the details of No. 7.

Mr. Roads: Do you mean to say, Mr. Trump, that the entire Eureka operation gets a certain number of cars?

Mr. Trump: On the old sheets, yes, sir, they are taken together for several reasons.

Examiner Brown: Do the recent sheets show the different Eureka operations separately?

Mr. Trump: No, sir; they are all together.

Mr. Krebs: Do not your distribution or rating

sheets show the number of cars, the percentage of cars, which each of the Eureka mines is entitled to?

Mr. Trump: No, sir; not the old sheets. The present sheets do. They show a consolidated rating and a consolidated delivery. They do show the kind of cars, that is coal Company, individual and commercial, but the records are all put together.

Mr. Krebs: Don't your old sheets show, for instance, Eureka No. 26, No. 27 and No. 7 separate, with the percentage of cars they are entitled to?

Mr. Trump: Yes.

Mr. Krebs: If you will give us a copy of that and the whole number of cars given to Eureka, that will be satisfactory.

Mr. Trump: In a great many cases the mines have been consolidated, showing three mines in a group, and each mine is given a proportion of that supply. The whole number of cars delivered are charged up to the three mines. I want to explain that because it would not be possible to give you the number delivered to No. 7 unless we went to the car record office and we could furnish that by the car record office, but it would be a long job.

Mr. Krebs: I do not understand you that our request in the Clark Brothers Coal Mining Company case cannot be complied with in that respect?

Mr. Trump: In the Clark Brothers case there is no large number of mines to be consolidated.

At 3.10 P. M. Court adjourned until Wednesday, October 11, 1915, at 10 A. M.

Philadelphia, October 11th, 1916, 10 a. m.

Present: Parties as before noted.

Mr. Roads: If the Court please, we ask that these distribution sheets be marked for identification.

(Distribution sheets marked as follows:

"Exhibit A", package marked "Tyrone Division, Coal Car Distribution Sheets, Jan. to June, inc., 1907", the seal being broken.

"Exhibit B", package marked "Tyrone Division, Coal Car Distribution Sheets, Oct. 1904, Nov. 1904, Dec. 1904, Year 1905", being sealed.

"Exhibit C", package marked "Tyrone Division, Coal Car Distribution Sheets Year 1906", being sealed.)

MR. GLEASON: There is one part of the record of the Interstate Commerce Commission that has not been read, that I might refer to in my argument.

THE COURT: Each side is at liberty to refer in the argument to the jury and read to the jury anything that is in the record. The other proposition is this, that to avoid unnecessary extension of this record, the technical record, we give you leave to read into the technical record whatever part of that other record you choose to read in. Both these propositions are stipulated.

MR. GLEASON: It will only be used for reference to the jury.

PLAINTIFFS CLOSE.

DEFENDANT'S SUR-REBUTTAL.

MR. BIKLE: I read from page 54 of the report of the Interstate Commerce Commission in the two cases heretofore described and which have eventuated in this trial the following paragraph:

"The complainants characterize as a special discrimination against their mine the fact, as is al-

leged, that they repeatedly had great difficulty in getting the trainmen and agents of the defendants to place on their siding and at their tipple the cars that had been assigned for delivery to them. It is said that the cars were frequently left at the foot of the siding, and that the complainants had to pull them into place with mules. It is also said that the cars were frequently delivered so late in the morning as not to leave them available during that day, and that cars delivered late in the day were not infrequently charged against that day's quota of cars and against the quota of the following day as well. On these matters, however, we do not find a sufficient basis in the record for affirmative conclusion, or anything to indicate that the complainants in those respects were put by the defendants on any less favorable basis than their competitors."

I read the first sentence for the second paragraph of the same opinion, found on page 55:

"While there are also other things shown of record which put the defendant on explanation and properly subject it to just criticism, the only point upon which the record affords a sufficient basis for affirmative findings grows out of the rules and system then in effect for the distribution of available equipment among the various coal mining operations."

DEFENDANT CLOSES.

TESTIMONY CLOSED.

Counsel for the plaintiff and defendant argued the case to the jury.

At 12.15 p. m. Court took a recess until 1.30 p. m.

INTERSTATE COMMERCE COMMISSION.

WASHINGTON.

I, GEORGE B. McGINTY, Secretary of the INTERSTATE COMMERCE COMMISSION, do hereby certify that the attached is a true copy of a blue print entitled "Tyrone Division of P. R. R.", the original of which was transmitted to the Commission with letter of Mr. John H. Minds dated January 11, 1909, and is now on file and of record in the office of this Commission in Docket No. 1136, James H. Minds and Julia A. Matz, trading as the Bulah Coal Company, against Pennsylvania Railroad Company.

IN WITNESS WHEREOF, I have hereunto subscribed my name, and affixed the seal of
(Seal) of said Commission, this 7th day of October, A. D. 1916.

GEORGE B. McGINTY,
Secretary of the Interstate Commerce Commission.

DEFENDANT'S EXHIBIT No. 5.

CERTIFIED COPY.

Opinion No. 1383.

Before the
INTERSTATE COMMERCE COMMISSION.

No. 1063.

HILLSDALE COAL & COKE COMPANY,
v.
PENNSYLVANIA RAILROAD COMPANY.

Submitted January 25, 1909. *Decided March* 7, 1910.

REPORT AND ORDER OF THE COMMISSION.

1. To the physical capacity of a coal mine the defendant adds its commercial capacity tested by the shipments made from it during the preceding 12 months, and divides the sum by two; these two factors being revised quarterly the mine is thus given a constantly corrected rating in the distribution of coal cars during percentage periods. If this basis is equitably applied to all mines served by the defendant the Commission is unable to see that it results in an unequal, unfair, or discriminatory distribution of its equipment.
2. The complainant's contention that physical capacity alone is the fair and sound basis for rating coal mines for car distribution is not sustained; the utmost obligation of a carrier under the law is to equip itself with sufficient cars to meet the requirements of a mine for actual shipment; and it is of no real concern to the carrier what are the physical possibilities of a mine in the way of daily output except as that factor may afford some measure of what its actual shipments will be.

3. The Commission reaffirms its previous ruling to the effect that the owner of private cars is entitled to their exclusive use and that foreign railway fuel cars assigned to a particular mine can not be delivered to another mine; but it again holds that all such cars must be counted against the distributive share of the mine receiving them. It is therefore *Held,* That the defendant's rule, providing that the capacity in tons of such "assigned" cars shall be deducted from the rated capacity of the mine receiving them and that the remainder is to be regarded as the rated capacity of the mine in the distribution of all "unassigned" cars, is unlawful and discriminatory.
4. The defendant's contention that, so long as the petitioner receives all the coal cars it is entitled to, it has no right to complain because some other operator receives an undue proportion of cars is not sustained. The law not only gives the shipper a right to an equal or a justly ratable use of the facilities of an interstate carrier but the assurance also that no other shipper shall fare ratably better at the hands of the carrier.
5. The question of damages, which the complainant claims to have suffered as the result of the discriminations herein found to have been practiced against it, reserved for further argument.

David L. Krebs and *Harry White* for complainant.
Francis I. Gowen, George V. Massey, and *Murray & O'Laughlin* for Pennsylvania Railroad Company.

REPORT OF THE COMMISSION.

HARLAN, *Commissioner*:

In this group of cases, of which the above-entitled complaint has been selected as the one in which the views of the Commission may best be expressed, the petitioners bring to our attention the method or rules

in effect on the lines of the defendant, during the period mentioned in the complaints, for the distribution of coal cars among the coal mines which the defendant serves. In each case the petitioner demands an order by the Commission requiring the defendant so to change or modify its rules that the distribution of its coal-car equipment may be made on what they regard as a more equitable and just basis. Damages in large amounts are also asked in order that the several complainants may be compensated for losses which they claim to have suffered by reason of the alleged failure of the defendant during the period of the action to give them the number of cars that they were justly entitled to receive.

The consideration of these complaints has been deferred because, when they were submitted for decision, there were pending in the lower courts and before the Supreme Court of the United States cases involving not only the question of the soundness and legality of the rulings heretofore made by the Commission respecting the distribution of coal cars by interstate carriers, but involving also the power and authority of the Commission to control and enter orders in respect to the practices of interstate carriers in such matters. Under the circumstances it seemed wise to await the final disposition of those cases in the court of last resort before making any further announcement of our views with respect to the matter of coal-car distribution; and this course seemed particularly desirable in view of the fact that the defendant in this proceeding, although not a party to any of the appeals in the Supreme Court of the United States, had been permitted, upon its special request and because of its interest in the questions involved, to participate in the argument and presentation of the cases before that court.

The general status of the question before the Commission may be readily ascertained by an examination of our decisions in one or two formal proceedings since

the passage of the so-called Hepburn Act. In *Railroad Commission of Ohio v. H. V. Ry. Co.*, 12 I. C. C. Rep., 398, we held that while a carrier during periods of car shortage might not assign privately owned cars to operators other than their owners, and might not assign foreign railway fuel cars to any mines except those to which they had been manifested by the foreign lines, it must nevertheless count all such cars against the distributive share of the respective mines to which the private cars belonged or to which the foreign railway fuel cars had been consigned; and in case the private cars or foreign railway fuel cars so delivered to a mine were not sufficient to fill out its distributive share of available coal cars, it should have in addition only so many of the system cars of the carrier as might be necessary, when added to the private or foreign railway fuel cars so received by it, to make up its full ratable proportion of the total available coal cars of all classes. We also held that all foreign railway fuel cars consigned to a particular operator, and all private cars owned by a particular operator, must be delivered to that operator, even though their number might exceed the ratable proportion of the particular mine in the distribution of available cars.

The order then entered to give effect to these conclusions was accepted by the defendant in that proceeding. But when the same general principle was applied by the Commission in *Traer v. C. & A. R. R. Co.*, 13 I. C. C. Rep., 451, to the distribution of company fuel cars the defendant in the latter proceeding declined to accept our order either as one within the power of the Commission to enter or as a just and proper disposition of the contention made upon the record. In the same report we disposed of similar complaints by the same petitioner against the Illinois Central Railroad Company and the Chicago, Peoria & St. Louis Railway Company. These companies also declined to obey our order. The result was proceed-

ings in the United States circuit court for the northern district of Illinois, the Illinois Central and the Chicago & Alton being the moving parties, in which that court held that the complainant carriers were not entitled to relief from that part of the orders of the Commission that required private and foreign railway fuel cars to be taken into account against the distributive share of the coal companies receiving them, but were entitled to an injunction restraining the enforcement of the orders of the Commission in so far as they related to the cars employed by the complaining carriers in hauling their own fuel coal. From this decree an appeal to the Supreme Court of the United States was prosecuted by the Commission and the whole question was considered by that tribunal in *Interstate Commerce Commission v. I. C. R. R. Co.*, 215 U. S. 452, and *Interstate Commerce Commission v. C. & A. R. R. Co.*, 215 U. S. 479, in which decisions have lately been announced.

The court there held, as the Commission had previously held in *Rail & River Coal Co. v. B. & O. R. R. Co.*, 14 I. C. C. Rep., 86, that the basis adopted by an interstate carrier for the distribution of coal cars among coal operators upon its lines was a regulation or practice "affecting rates" as that phrase is used in section 15 of the amended act to regulate commerce, and as such was a matter within the regulative power of the Commission. It was also held that the fuel cars of an interstate carrier, in which it hauls fuel for its own use, are instruments of interstate commerce as fully as are its system cars in which commercial coal is hauled for shippers; and consequently "that such cars are embraced within the governmental power of regulation which extends, in time of car shortage, to compelling a just and equitable distribution and the prevention of an unjust and discriminatory one." Drawing attention to the distinction that must necessarily be observed by the courts between the power to regulate

and the unwise exercise of the power in a given case, that court disclaimed for itself, and also denied to any other federal court, the right to usurp the purely administrative functions of the Commission by substituting a regulation that the court might deem wise for one which it considered the Commission in the exercise of its conceded power had inexpediently adopted. The decree of the lower court enjoining the enforcement of the order of the Commission, in so far as it related to the distribution of company fuel cars, was therefore reversed.

It thus appears that the orders of the Commission with respect to the distribution of coal cars by intertate carriers, as expressed in the several cases referred to, remain unaffected by the attacks that have been made upon them in the courts. And our further consideration of these questions in connection with this group of cases has confirmed our conviction that the general principles underlying the disposition made of the previous cases are both sound and just. We shall therefore proceed to ascertain what has been and is now the practice of the defendant in respect to the distribution among coal operators of its available coal-car equipment, and how far it differs, if at all, from what the Commission has regarded and, in the cases referred to, has announced as the just and equitable basis of distribution. It may be well, however, first to say a word in respect to the method or basis in effect on the lines of the defendant for assigning to each of the coal mines that it serves a daily output rating for determining its proportion in the distribution of coal cars, that being one of the practices of the defendant of which complaint is made by the petitioner herein, as well as by the petitioners in the other cases in this group.

In *Rail & River Coal Co. v. B. & O. R. R. Co.*, 14 I. C. C. Rep., 86, it appeared that the method of rating mines adopted by that carrier involves two principal

factors, (*a*) the physical capacity of the mine, and (*b*) its commercial capacity. The physical capacity is ascertained in the manner explained in our report of that case (*id.*, p. 93) and the method need not therefore again be described. It will suffice to say that it is substantially the plan now generally followed by coal-carrying roads. The commercial capacity, or the requirement of a mine for cars as tested by its actual shipments is arrived at by taking the volume of the shipments made by a mine during a period of free-car supply, usually of four months and generally from April 1 to August 1, in each of the two preceding years. The three figures, expressed in coal tons, namely, the physical capacity, the commercial capacity for the first year, and the commercial capacity for the second year, are added together and the sum is divided by three. The result is the capacity basis that is established by the Baltimore & Ohio for determining the percentage of the available coal equipment that the particular mine is entitled to receive during any period of car shortage. After a careful consideration of the system as applied to interstate shipments, we were inclined to think and so intimated (*id.*, p. 96), that a method of rating coal mines based upon a combination of their physical and commercial capacities more closely approximates their actual car requirements than a system based upon physical capacity only.

But in this petition the complainant, as we understand its attitude, demands that the commercial capacity of the mines served by the defendant shall be eliminated as a factor in fixing their rating and that their physical capacity shall be accepted as the sole factor for determining their respective proportions in the distribution of coal cars. The defendant, while combining the physical with the commercial capacity, does so in a way that differs somewhat from the plan in effect on the Baltimore & Ohio. To the physical

capacity of a mine it adds its commercial capacity for one year only and divides the sum by two. The commercial capacity, however, is not based upon shipments made from a mine during a substantial period of free-car supply, as is the case on the Baltimore & Ohio, but upon the entire volume of shipments made from the mine throughout the preceding twelve months. The ratings are revised quarterly on February 1, May 1, August 1 and November 1; the rating of any particular operation will also be revised by the defendant upon request regardless of the quarterly tests. In other words, the commercial capacity of each mine is brought up to date at each quarterly rating period by taking into consideration its new tonnage for three months and adding to it the tonnage of the preceding nine months previously used in the preceding rating. In this manner the defendant endeavors to follow up as closely as possible the fluctuations in the market, labor conditions, and car supply. By combining the commercial capacity of a mine, thus ascertained and constantly brought up to date, with its physical capacity, the rating of the mine in the distribution of coal-car equipment is determined. And if this system of rating is equitably applied to all mines served by the defendant we are unable, so far as our investigations to the present time have informed us on the question, clearly to see upon what grounds it may be said to result in an unequal, unfair, or discriminatory distribution of its equipment.

But, as heretofore stated, the complainant insists that the physical capacity of a mine is the sole and only proper basis for determining its rating for purposes of car distribution. The economic waste involved in a system that leads operators to develop their mines beyond their commercial requirements and for the sole purpose of increasing their percentage of coal-car supply was discussed in *Rail & River Coal Co. v. B. & O. R. R. Co., supra.* While an order of the Commission in a particular case must necessarily fix the rights of

the parties to the proceeding, so far as past shipments are concerned, and must necessarily restrain, until our further order, the continuance of the rate or practice that we condemn, and compel the carrier to observe the rate or practice that we prescribe for the future, these great questions of transportation are not foreclosed of further discussion and consideration upon further complaint. Additional experience with the actual operation of rules that combine commercial with physical capacity in the rating of coal mines for car distribution, may throw new light upon a matter that has vexed the Commission as well as many carriers that have endeavored to do equity as between different mines on their lines; and if so, we shall not hesitate to modify what has been said here and in other cases before us on that question. The principle of *stare decisis* has little application in proceedings before us involving questions of this nature. But at this time and upon the present state of our information and experience in the matter we can not accept the complainant's contention that physical capacity alone is the fair and sound basis for rating mines for car distribution. Speaking in precise terms, it is of no real concern to a carrier how large a particular mine may be and what are its possibilities in the way of daily output, except as those factors may afford some measure of what its actual shipments will be. The utmost obligation that the law lays upon the carrier is to equip itself with sufficient cars, not to meet the hopes and expectations of the owner of a mine as expressed in its physical development, but to meet his actual shipments. A mine rating that is adjusted to the expectations of the operator and altogether ignores his actual requirements might easily result, in a period of car shortage, in giving him cars for every ton of coal that he can actually dispose of, while an adjoining mine, with a small development but a larger demand for its output, would get but a fraction of the equipment that it needs to meet its actual contracts.

In *Powhattan Coal & Coke Co. v. N. & W. Ry. Co.*, 13 I. C. C. Rep., 69, the record showed that thousands of dollars had been expended in the erection of additional ovens, not for actual use or to meet any commercial demand for more coke, but solely for the purpose of securing additional cars in the distribution by the carrier of its equipment during car shortage periods; and we there condemned a rule for the distribution of coke cars that ignored actual shipments and was based solely on the number of coke ovens that had been erected by the different coke companies. Nothing has since developed, or was suggested in this proceeding, to change our view on the general question, and the complainant's contention that physical capacity is the fair and reasonable basis for rating mines for car distribution must therefore be dismissed as untenable.

We come now to the practice of the defendant in the past and at the present time in the distribution of its available coal-car equipment.

Under a rule announced by it on February 1, 1903, the defendant seems to have charged all railroad cars, regardless of ownership, and private cars not owned by the operator loading them, against the distributive share of each mine, but it treated its own fuel cars as a special allotment in addition to the distributive share. On March 28, 1905, a notice was sent to shippers of bituminous coal from mines on the lines of the defendant advising them that thereafter all railroad cars, regardless of ownership, and all private cars not owned by the operator loading them, should be considered as cars available for distribution, except its own company fuel cars and fuel cars sent upon its lines by foreign companies and specially consigned to particular mines.

On January 1, 1906, the defendant divided all cars into two classes which it designated as "assigned" and "unassigned" cars. In the former class were its own fuel cars, foreign railway fuel cars, and individual or private cars loaded by their owners or assigned by

their owners to particular mines. The rule then made effective and still in force provides that the capacity in tons of any "assigned" cars shall be deducted from the rated capacity in tons of the particular mine receiving such cars, and that the remainder is to be regarded as the rated capacity of the mine in the distribution of all "unassigned" or system cars. This order or rule of the defendant was the occasion of some comment in *Logan Coal Co. v. P. R. R. Co.*, 154 Fed. Rep., 497, 498, where the court says:

> To illustrate the effect of the order on an individual number of cars as compared with a competitor receiving only company cars, take two operators each having mines rated at 500 tons a day, and assume that on any given day the company has enough of its own cars on hand to deliver to all mines cars which would take care of 70 per cent. of the output. Assume that one operator has individual cars available on that day for the shipment of 200 tons, while the other has no individual cars at all. The latter receives railway company cars capable of carrying 70 per cent. of 500 tons, or 350 tons. The former, on the day in question, will receive individual cars in which he can ship 200 tons, and his rating for a distribution of the company's cars for that day will be reduced to 300 tons, 70 per cent. of which is 210 tons, for the transportation of which he will receive company cars, so that the operator with the individual cars will be able to ship on the day instanced 410 tons, as against the shipment of 350 tons by the operator who has no individual cars. To this extent the relator has the advantage over its competitors who do not own individual cars, and it receives the exclusive use of its cars at all times.

The results arrived at by the court in its illustration seem to us not quite accurate, in that the total car

capacity of 700 tons assumed by the court is made up of the company's system cars, and excludes from consideration the fact that one of the mines had on hand individual cars having a capacity of 200 tons, making a total available car capacity of 900 tons. Worked out on the basis of that total car tonnage the owner of the private cars would receive equipment enough to enable him to ship 463 tons and not 410 tons as stated by the court, while the mine depending upon system cars only would be able to ship 437 tons instead of 350 tons as stated by the court. The court used a car capacity of 70 per cent. as the total available equipment for the output of both mines instead of a car capacity of 900 tons, or 90 per cent., which was actually on hand in the case assumed. In other words, the court absorbs in its illustration only 760 tons of the output of the two mines, while the facts assumed show that car capacity of 900 tons was available. Under the Commission's rule each mine under these circumstances would have been able to ship 450 tons.

Using the same two mines with an assumed capacity of 500 tons each day and available equipment with a total capacity of 70 per cent. or 700 tons, including the individual cars with a capacity of 200 tons owned by one of the mines, the rule of distribution which this Commission has approved in *Railroad Commission of Ohio v. Hocking Valley Ry. Co.* and *Traer v. C. & A. R. R. Co., supra,* would result in giving the latter mine its individual cars of 200 tons capacity and system cars enough to absorb 150 additional tons, or a total of 350 tons, being one-half of the available equipment tonnage. The mine not owning the individual cars would get the other half of the available equipment tonnage, but all of it in system cars. Under the defendant's rule, on the other hand, the mine owning the individual cars would receive them and would thereby be able to ship 200 tons of its total output capacity of 500 tons a day. The rating of this mine would

then be reduced to 300 tons a day as against the rating of 500 tons assigned to the mine owning no private cars, the total reduced rating for the two mines being 800 tons. Instead of 700 tons the equipment remaining available for distribution would carry but 500 tons, of which the mine owning individual cars would get three-eighths, or 188 tons, making its total tonnage 388 tons, while the other mine would get five-eighths, or system cars of a capacity of 312 tons, an advantage of 76 tons enjoyed by the mine owning private cars in the distribution of all available equipment. That mine under the defendant's rule would therefore be able to ship out between 20 and 25 per cent. more coal than its competitor, while under the rule approved by the Commission the shipments of the two mines would be the same under the facts assumed by the court in the case cited.

Referring to system fuel cars and foreign railway fuel cars consigned to a particular mine, the court in *Logan Coal Co. v. P. R. R. Co., supra,* said, p. 503:

> The general trend of the decisions is to the effect that all cars, whether individual cars or owned by the railroad company, or assigned by other railroad companies for fuel, shall be treated as an available car equipment as a whole, distributable pro rata to shippers desiring their use along the line, upon a basis giving each equal facilities with the other. Following are some of the cases in which these questions have been considered: *United States ex rel. Coffman v. N. & W. Ry. Co.* (C. C.), 109 Fed. Rep., 831; *United States ex rel. Kingwood Coal Co. v. W. Va. & N. R. R. Co. et al.* (C. C.), 125 Fed., 252; *W. Va. & N. R. R. Co. et al. v. United States ex rel. Kingwood Coal Co.*, 134 Fed., 198, 67 C. C. A., 220; *United States ex rel. Greenbrier Coal & Coke Co. v. N. & W. Ry. Co.*, 143 Fed., 266, 74 C. C. A., 404; *State ex rel. v. C., N. O. & T. P. Ry. Co.*, 47 Ohio St., 130, 23 N. E., 928; *United States ex rel. Pitcairn Coal Co. v. B. & O. R. R. Co. et al.*, 154 Fed., 108.

That is the general theory for the distribution of coal-car equipment that has appealed strongly to this Commission as being fair, reasonable, and nondiscriminatory. We recognize the right of a company to contract with a particular operator for its fuel supply; we recognize the right of a connecting line also to do this; and each may send its cars to those mines to the exclusion of other mines. We also insist that the owner of private cars is entitled to their exclusive use. But in each case we hold that all such cars must be counted against the distributive share of the mine receiving them. When subjected in all its different phases to the scrutiny of the Supreme Court of the United States in the cases just decided and announced (*supra*) the position of the Commission in this matter was not found objectionable either on legal or constitutional grounds. And as the exhaustive arguments and our further consideration of the same questions in these proceedings have not given us any new light or led us to any different conclusions, the rulings in the previous cases must control the disposition of the complaints in this group of cases so far as they may be pertinent.

Upon all the facts shown of record the Commission therefore finds that throughout the period of the action the system upon which the defendant distributed its available coal-car equipment, including system fuel cars, foreign railway fuel cars, and individual or private cars, has subjected the complainant to an undue and an unlawful discrimination. In this connection an important disclosure is made in a letter of record here, addressed to the president of the Clark Brothers Coal Mining Company under date of March 6, 1907, by the general superintendent of coal transportation of the defendant company. It is there stated that the distribution of coal cars on the lines of the defendant on that date was as follows:

	Per cent.
System cars for company coal	21
Foreign cars for supply coal	6
Individual cars	45
System cars for commercial coal	25
Foreign cars for commercial coal	3
Total	100

This condition of affairs emphasizes the inequity of a system of distribution that first deducts from the rated capacity of a mine the tonnage represented by the capacity of the cars specially assigned to it and then uses the remainder as a new basis for determining the proportion of unassigned cars that the mine is to have. The figures above given show that 72 per cent. of all the cars available on the lines of the defendant on the date mentioned were assigned cars, and but 28 per cent. were unassigned cars. Manifestly such a basis of distribution can have but one tendency, and that is, not only to steadily increase the physical capacity of the mines that regularly receive this large percentage of assigned cars, but also steadily to increase their commercial capacity, an advantage which the mines having the benefit of no assigned cars obviously can not enjoy. With such a large percentage of assigned cars it can not be doubted that the equipment furnished to some of these mines was sufficient to approximate their ratings, while the small percentage of unassigned cars makes it equally clear that the mines having no other cars must have fallen substantially short of their ratings.

We further find that the continuance of that system of distribution for the future would be unlawful on the same grounds. Although the mine owning private cars or to which company or foreign railway fuel cars are consigned is entitled to receive them even though in excess of its ratable proportion of all available coal-car equipment, nevertheless the defendant

will be required in the future to count all such cars against the distributive share of the mine so receiving them. It is scarcely necessary to add that the complainants second request for a finding and for an order requiring the defendant, during percentage periods, to distribute ratably among operators, according to the actual output capacity of their mines, "all cars adapted to and used for carrying bituminous coal," whether company fuel cars, foreign railway fuel cars, or private cars, must be denied.

In view of our finding herein that the practice of the defendant in not counting assigned cars against the ratings of the mines has been discriminatory and has resulted in injury to the complainants in this group of cases, it is suggested that it will not be fair or equitable to content ourselves with the condemnation of that practice and the entry of an order requiring a different practice for the future; such a course, it is said, will leave the complainants under the disadvantage that the practice has wrought in the past, while giving to the favored mines the results that have wrongfully accrued to them. In other words, it is said that, under the rules here condemned, the preferred mines have been able year by year to enlarge their commercial output while the commercial output of the complainants and others has been restricted; and that justice requires that there shall be a new point of departure, at least for the present, based solely upon the respective physical capacities of the mines on the lines of the defendant. Exact justice is ordinarily not attainable. It is difficult no less for this Commission than for a court to deal with such a situation as this with mathematical accuracy. The most that either may hope to accomplish in such a state of facts is to do substantial justice; and this we do, so far as it seems to us possible, when we require the defendant to adjust its rules on a proper basis for the future, and give to the complainants the opportunity to have their

injuries redressed in the form of damages. While the tendency of the prior rules must have been to enlarge the commercial capacity of the preferred mines, we can not doubt that their physical capacity has also been enlarged. And we have no assurance that an order requiring the defendant, for the present as suggested, to distribute its cars on the basis solely of physical capacity would not, in some cases at least, work very substantial injustice.

That the practices of the defendant with respect to the rating of mines and the distribution of coal-car equipment were, to some extent at least, in a loose and unsatisfactory condition prior to 1905 not only appears in this record, but in the record of the coal and oil investigation made by the Commission under the joint resolution of the Congress approved on May 7, 1906. There seems at that time to have been a more or less well-defined policy on the part of the defendant to discourage the opening of new coal operations. But just how far this condition of affairs, prior to January 1, 1906, when the new regulations went into effect, may adversely have affected the complainant in a financial sense it is impossible upon this record to say. The increasing price received for coal in the general markets suggests the possibility that the coal not mined at that time may subsequently have been mined and sold to the complainant's advantage. There are one or two other matters, however, of which complaint is made and to which it may be well here to refer.

The evidence shows that quite frequently, just how often not appearing, cars were placed at the mines of the petitioner too late to be loaded on that day, and one of the complaints made in the petition is that prior to January 1, 1906, the defendant charged such cars against the complainant's allotment not only for the day on which they were so placed but also against its allotment for the following day. It is even said that the complainant's mines were charged with cars placed

there during the night. At the time in question, whatever may now be the case, it was the custom of the miners to enter the mines at 8 a. m., and under the rules then in effect, if cars were not on the siding ready for loading at that time but were received later during the day they would not be loaded until the next day. It does not appear just what the defendant's system was prior to January 1, 1906, with respect to the counting of cars placed at the mines for loading and not loaded until the following day. But the distribution sheets after that date contained a rule as follows:

> A car placed too late for loading will not be counted as available for loading until the following day. A car available for loading and not loaded will be counted each day in column headed "Empty cars over" until loaded or otherwise disposed of. A car loaded and not consigned will, unless consigned on the unloading day, be counted each day in column headed "Unconsigned loads over" until consigned.

No claim is made upon the record that this rule, which seems still to be in effect, does not give fair results or that there is any discriminatory practice being carried on with respect to this phase of car distribution. So far as concerns the defendant's practice before that date there seems to be no indication of any discrimination in this respect against the complainant in this or in the cases that follow it; nor is there any evidence that other mines were unduly favored in that regard.

It also appears that at an expense of about $5000 the complainant had constructed a tipple at its mine No. 2 and also a siding connecting it with what is known as the "Fuller Run tracks," a road about one mile long extending from the defendant's line to mines from which shipments had been made for a number of years, but which at this time seem to have been closed. From

its mine No. 2 the complainant was ready to make shipments in April, 1903, but the siding, as it asserts, was spiked down by the defendant and kept in that condition for about nineteen months. Requests were made by the complainant from June 28 to July 31, 1903, for cars enough to ship 100 tons of coal per day from that mine. But no cars were furnished by the defendant until January 17, 1905, and then only after mandamus proceedings had been instituted in the courts. The defendant's failure to supply cars for that mine, while supplying cars to other mines in the district, is one of the discriminations alleged in the complaint. What reason it had for refusing or failing to set cars there is not satisfactorily explained of record. But for some reason also not explained the complainant allowed the matter to rest in that condition for many months without taking any steps against the defendant and without even renewing its demand for cars so far as the record discloses. It is not clear, moreover, that the alleged closing of that siding by the defendant can fairly be regarded as a basis for a charge of discrimination; it has more the character of a tort or a wrongful violation of the defendant's general duty to the complainant as a common carrier for which an appropriate action in the courts would doubtless lie to recover any damages thus sustained.

It is also asserted by the complainant that its mines were unfairly rated when compared with the ratings assigned to other mines in the same district and that as a result of this discrimination it suffered substantial losses. Although it appears that the capacity assigned in 1903 to certain of the mines of Williams & Company in the same mining district was greater than that established for the same mines in 1906 after a more accurate system of mine rating had been devised, the proof is not sufficiently clear to permit of a definite finding of a discrimination against the complainant in that respect. It does appear that prior

to January 1, 1906, the rating assigned to mines in the nine coal-mining districts on the lines of the Pennsylvania were made, with the approval of the general superintendent, by division superintendents upon the general information of the latter officials, derived from observation and their general knowledge, and not upon any definite principle or plan for rating mines. The ratings, therefore, varied in accordance with the information and ideas of the different superintendents. We do not in fact understand the defendant to claim that there was any real system of mine rating in effect at that time. This lack of system was indeed characteristic of other large coal-carrying lines at that time, as is shown in the report of this Commission to the Senate and House of Representatives in the investigation to which reference has just been made.

The defendant meets this point by asserting that the real question to be determined is whether the complainant received less than its proper share of the cars distributed by the carrier during periods of scarcity of equipment and that it is not material that some other coal operator may have received more than his quota of available cars. In other words, the contention is that so long as the complainant received all the cars it was entitled to it has no right to complain that some other coal shipper, as the result of a high mine rating or otherwise, secured an excessive proportion of the available cars, if this preference was not at the expense of the complainant. We must reject that view. The act to regulate commerce as amended not only gives a shipper a right to an equal or a justly ratable use of the facilities of an interstate carrier, but gives him the assurance also that no one else shall fare ratably better than he does at the hands of the carrier. It may be true that a court would not allow the complainant damages for losses due to the defendant's failure to furnish it cars that it was not entitled to receive, but this Commission may surely require an

interstate carrier to cease and desist from giving its competitor more cars than the competitor is entitled to receive.

But upon this part of the case the complainant's own witnesses do not sustain it to the full extent of its contentions, and we can only express the general impression that neither in its rating nor in its car supply did the complainant fare as well at the hands of the defendant as it possibly should have done. We find it impossible, however, to arrive at any clear or accurate statement of the extent of the discrimination. Williams & Company, its chief competitor in that district, received many more cars than the complainant and their mines enjoyed a higher capacity rating than was assigned to the mines of the complainant. They sold large quantities of coal to the defendant for use in its locomotives, and these cars were not counted against Williams & Company. While there was doubtless some discrimination in these matters, as there certainly was in the defendant's failure to count its own fuel cars against those mines, it is difficult, if not impossible, to assign definite boundaries to it and to say at this time what should have been the rating of the respective mines and what should have been the proportion of each in the distribution of the defendant's coal-car equipment.

It is suggested that under its corporate charter, granted by the State of Pennsylvania, the defendant is not only a common carrier or transporting agency, but that its rails are at the same time a public highway, and it must therefore haul loaded or empty private cars for their owners upon reasonable terms. There is in its charter some language to that effect; and in *Boyle v. P. & R. Ry. Co.,* 54 Pa. St. Rep., 310, cited by counsel for the defendant on the argument, the Supreme Court of Pennsylvania held that a similar charter of another company in that state contemplated such a dual use of the road, by the company itself as a carrier in transporting the freight of shippers and by

the owners of cars as a public highway substantially in the sense that a canal or turnpike is a public highway. Counsel, therefore, contends that the dual capacity in which the defendant is required to serve the public, as shippers and as car owners, necessarily eliminates from the case the argument that individual cars or private coal cars must be treated as railroad-system cars for purposes of allotment or distribution. It is urged that private cars may properly be counted against the mine owning them only in the manner and to the extent that the defendant's present rules take them into account in periods of car shortage.

Without entering upon any discussion of the extent to which the terms of a charter granted to a carrier by a state may control or limit the performance of its functions and obligations as an agency of interstate transportation, it will suffice to say that in none of its decisions relating to coal-car distribution has the Commission undertaken to forbid the use of private cars by their owners, even though in a period of car shortage the number of cars owned by a mine may enable it to load daily more than the number of cars that it would receive if dependent solely on its share of system cars. On the contrary, the Commission has not only recognized the right of carriers to move private cars, but has insisted that the owners may not be deprived of the use of their individual cars and that such cars may not be thrown into the general pool of system cars and thus be diverted to the use of other operators. As the Commission has made no ruling that conflicts with the rights and obligations arising under the defendant's charter as construed by the state Supreme Court, we need not, and do not, here consider what the situation would be if the terms of its state charter required the defendant carrier in the distribution of its coal-car equipment to work an undue discrimination against an interstate shipper in violation of the act to regulate commerce as amended.

The petitioner in this complaint bases its claim for damages on the amount of coal that it might have mined, if the defendant had furnished it with a sufficient supply of cars to enable it to work its mines twenty days a month during the period covered by the complaint. It also claims that the cost of mining the coal actually taken out during the period in question was higher than it would have been had the defendant furnished it with an adequate supply of cars, thus enabling it to operate its mines to the best advantage by running them regularly and to their full capacity. In making up the amount of its claim the petitioner excepts a period of four months during 1906 when its miners were on a strike and takes the average selling price of coal during the remainder of the period covered by the action. It deducts as the cost of mining an amount per ton that is estimated as the probable cost had the defendant furnished the complainant with cars enough to enable it to run its mines at full blast and with the regularity that produces the best results. Upon this general basis the complainant asserts that it has been damaged as the result of the alleged discriminations against it by the defendant in the sum of $127,855.65, and for this amount it asks an award at the hands of the Commission.

The complaint herein was filed before our decision in *Joynes v. P. R. R. Co.*, 17 I. C. C. Rep., 361, was announced. In that proceeding damages were demanded for losses alleged to have been suffered in the decay of the complainant's fruit by reason of an alleged discrimination against him in favor of other dealers in fruit to whom the defendant, as the complainant contended, had given a preferred use of its unloading platform, thus delaying his shipments until the fruit was spoiled. We held, upon grounds that are there fully stated and need not be repeated here, that while the Commission was competent to find that a discrimination had been practiced, the measurement or ascer-

tainment of the damages the complainant had suffered in consequence thereof was a judicial question for the courts and not for the Commission; the view expressed was that the only damages that may be assessed by the Commission under the amended act were rate damages or damages that could be measured by the difference in the rate actually charged and the rate which, for any reason under the act, ought lawfully to have been charged; and that the complainant's remedy for the damages in compensation of the loss suffered in the value of his fruit was in the courts.

That case differs from this in that it involved a single wrong in the nature of a tort against a particular shipper, while this case in its larger aspect involves the validity of a rule for car distribution applicable alike to all coal shippers on the line of the defendant and resulting, as we have pointed out, to the benefit of some shippers and to the injury of others. We have found that in the particulars herein explained, discrimination was practiced, and have held that for such damages as resulted the complainant is entitled to recover from the defendant. As to whether we may go beyond the transportation question, the alleged discriminatory rules and practices, and enter upon an inquiry as to the amount of the damage that may have been suffered by the complainant, the Commission is divided as in the case to which we have just alluded. The majority is still of the opinion that it is not for us under the law to assess and determine the measure of the damages thus sustained by the complainant, that being a judicial question for the courts. At the most any finding by the Commission as to the amount of damages would be the expression of an opinion that could not be enforced by the Commission and would have no conclusive and binding effect upon the court to which, in any event, resort must be had by the complainant for a finding and judgment in the usual manner required by fundamental law. The minority, con-

ceding some of the difficulties to be encountered in dealing with such matters, nevertheless interpret the law as necessarily casting that burden upon the Commission.

Since our decision in *Joynes v. P. R. R., supra,* was announced, our attention has been called to an opinion by Judge McPherson of the United States district court, sitting in the circuit court of the United States for the eastern district of Pennsylvania, in *Morrisdale Coal Co. v. P. R. R. Co.,* 176 Fed. Rep., 748 (advance sheets of May 12, 1910). That was an action by the coal company against the defendant herein to recover damages in the sum of $250,000 for the sales and contracts that are alleged to have been lost because of the discrimination resulting from the same coal-car distribution rules that are involved in the proceeding now before us. Citing *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.,* 204 U. S., 426; *Baltimore & Ohio R. R. Co. v. U. S.,* 30 Sup. Ct., 164; and *Interstate Commerce Commission v. I. C. R. R. Co.,* 173 Fed. Rep., 930, Judge McPherson holds that the Commission and not the courts has primary jurisdiction to award reparation for the general damages of that character that may have resulted from a preferential practice in the distribution of coal cars during a percentage period. The case brings a new element into the situation. That is the court whose jurisdiction this complainant would doubtless invoke in order to secure pecuniary redress for the wrongs which the complainant claims to have suffered as the result of the discrimination we here find to have been practiced against it and others by the defendant. There is possibly no necessary conflict between the view there expressed and a refusal by the Commission to measure the complainant's damages in this case, after having found that a discrimination existed; but there is some danger, in view of the ruling of the court in that case, that justice may be defeated altogether in this case if we

proceed no further with it. We have concluded therefore to order a further argument early in the fall with respect to the amount of damages suffered by the complainant in this proceeding, and by the petitioners in the other cases in this group of complaints, as the result of the discriminations that we find to have existed. Under all the circumstances, this seems the prudent course to pursue. The order of the trial court dismissing the action of the Morrisdale Coal Company, for want of jurisdiction, has been taken for review to the circuit court of appeals; and if our further consideration of this group of cases results in awards of damages to the complainants and they resort to the courts for their enforcement, in case payment is contested by the defendants, the courts will then have the whole question before them and some definitive interpretation of the act with respect to the extent of the authority of the Commission and the courts in this regard will follow, and this is highly desirable for the future guidance of both.

An order will be entered in accordance with these conclusions.

PROUTY, *Commissioner,* dissenting:

Although I am myself of the opinion that this case has been sufficiently talked about and sufficiently considered, and that it ought to be finally disposed of, still if the majority deems it necessary to hear further argument upon the question of damages, I do not dissent from that course. I do not agree with the holding of the majority that this Commission has no authority to assess and award these damages, and while it is not now proposed to make any order from which I dissent, I wish to express my views upon that subject. To my mind there is a clear distinction between the *Joynes case,* 17 I. C. C. Rep., 361, and the one before us.

Joynes was a fruit merchant located at Pittsburg, whose complaint was that the defendant had systematically delayed the movement and delivery of his

traffic, in comparison with that of his competitors, whereby he had suffered serious damage. The act of the defendant was alleged to be in violation of the third section and the holding of the Commission was that, even if in violation of that section, damages could not be awarded by the Commission. No rate, regulation, or practice of the defendant was involved. The act complained of was personal to Joynes. While it seems to me that under the terms of the eighth and ninth sections of the act Joynes, in a case like that detailed, had a cause of action for the recovery of damages against the defendant which he might prosecute before this Commission, it also appears to me that he might have brought his complaint in the first instance before the court. Had he begun such a suit it would not have been obnoxious to the objections sustained by the court in the *Abilene case*, 204 U. S., 426, or the *Pitcairn case*, 215 U. S., 481.

In the case before us this is different. Here is not a particular discrimination arising out of the conduct of the defendant toward a particular shipper, but rather a discrimination which inheres in a rule of the defendant applicable to all shippers and presumably enforced alike as to all shippers. While the courts might well be invested with exclusive jurisdiction to hear and determine suits like that of Joynes, it seems to me that in the case before us the Commission not only must, under the statute, but should, as a matter of convenience, award damages.

Sections 8 and 9 in my opinion give to the complainant a right of action for damages against the defendant and confer upon it the privilege of applying to this Commission for an order awarding those damages. It is impossible for me to put any other meaning upon the plain language of these sections, which read, so far as material to this question, as follows:

SEC. 8. That in case any common carrier sub-

ject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee, to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case.

SEC. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the two methods of procedure herein provided for he or they will adopt.

Here is a clear statement that in case of a violation of the act resulting in damages to any person the carrier shall be liable for such damages, and an equally explicit declaration that the recovery of such damages may be had either by a proceeding before the Commission or by suit in court; but that both remedies shall not be pursued for the recovery of the same damages.

The reasons of the majority for declining to exercise this jurisdiction, which is explicitly conferred by the ninth section, are stated in the *Joynes case*. It is there said in substance that damages resulting from a violation of the act may be divided into two classes,

"rate" damages and "general" damages. By rate damages are meant those damages which can be ascertained by computation from a reference to the rates of the carriers only. The Commission determines what the reasonable rate ought to be; it determines what rate has been paid; the damages are the difference between the rate exacted and the rate which should have been exacted. These damages the Commission can and should award.

General damages may involve a consideration of all those elements which enter into the determination of damages in other cases. There is no exact measure by which such damages can be computed. To assess them involves the consideration of evidence and the exercise of judgment. For the assessment of such damages this Commission has no greater qualification than a jury. Therefore, it is assumed that Congress, notwithstanding its express language to the contrary, did not intend to confer upon the Commission authority to deal with damages of that character.

In support of this somewhat novel canon for the interpretation of statutes the Commission refers to the action of the Supreme Court of the United States in the *Abilene case, supra,* in which that court held that, notwithstanding the language of the ninth section, by which a claimant is given an election between his suit in court and his proceeding before the Commission, nevertheless, in certain cases, the proceeding must be in the first instance before the Commission and can not be in court. Just as the Supreme Court in that case has read out of the ninth section the right to begin certain cases before the courts, so the Commission now proposes to read out of that same section the right to proceed in certain cases before the Commission.

I can find no case in which the Supreme Court of the United States has ever undertaken to qualify the express language of an enactment upon the ground adopted by this Commission in the *Joynes case.* That

court has repeatedly said that courts have nothing to do with questions of expediency. Whether a statute is wise or unwise, whether it is expedient or inexpedient, whether the object aimed at is reached in the best way or not, are questions for the legislature not reviewable by the courts. The *Abilene case,* as I read it, not only fails to sustain the position of this Commission in declining to accept jurisdiction in matters like that before us, but, upon the contrary, plainly holds, both by necessary inference and by express language, that in a case like the one now under consideration the only tribunal in which complaint can be brought and damages obtained is this Commission. If that be so, it is certainly the duty of the Commission, no matter how inconvenient the exercise of that function may be, to entertain the complaint, determine as best it can the damages, and award those damages by its order.

It should be clearly understood at the outset just what that violation of the act is of which complaint is made and for which damages are demanded.

It is true upon most coal-carrying roads, and was true upon the lines of the defendant during the period covered by this complaint, that in times of an active coal movement there are not sufficient cars to supply the demands of all mines. The amount of business which the miner can do depends upon the number of cars which he can obtain for the movement of his product. To furnish one mine with cars while they are denied to a competing mine means that the favored mine shall do business while the other stands idle. This renders preference in the furnishing of coal cars, a most serious form of discrimination, and makes necessary the establishment of definite and uniform rules and regulations for the distribution of such cars to different operations during the period of car shortage.

The complainant alleges that the system under which the defendant distributed its coal cars was unlawful and discriminatory, in that certain classes of

cars were furnished to mines in competition with it and not counted against the distributive quota of those mines, which resulted in the giving of more cars to its competitor than it was justly entitled to have. The allegation is not that the defendant made the complainant the object of any special act of discrimination. It did not unfairly apply its system of distribution in determining the number of cars to which the complainant was entitled, nor did it fail to deliver at the complainant's mine the cars to which it was entitled under the scheme in force; but it applied a system or a practice which in its working out was unjust and discriminatory to the complainant.

The Commission finds that the method of distribution in force as to all shippers upon the lines of the defendant during the period covered by this complaint was unlawful and discriminatory and has directed the establishment of a different system for the future; but it declines to consider to what extent the complainant has been injured by the application of this practice, and to ascertain and award the damages which, confessedly, must have accrued.

To my mind there is no distinction between a practice of this kind and a rate. Every reason which requires the Commission to entertain claims of unreasonable rates and to award damages if the claim is sustained, requires with equal force that claims on account of discrimination by the application of general rules and practices of this character should be made in the first instance to the Commission and that damages should be awarded if the practice is found unlawful. If any distinction can be drawn between instances in which the Commission may and may not award damages for a violation of the act, that distinction should be founded, not upon the character of the damage, but upon the character of the act out of which the damage grows. If the thing alleged to be unlawful is a rate, regulation, or practice of general application which

touches the entire shipping public alike, over which the Commission has control, with respect to which it must determine the reasonableness, and as to which it could order the substitution for the future of a different rate, regulation, or practice, then the proceeding for damages must be begun in the first instance before the Commission, and it is the duty of the Commission to ascertain and award the damages. This position is fully sustained by the recent decisions of the Supreme Court.

Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U. S., 426, is familiar to all and only the briefest reference to it is needful.

The Cotton Oil Company claimed that certain rates imposed by the defendant for the transportation of cotton seed were excessive and brought suit in court to recover the amount of the excess. The transportation was interstate and the rates charged were those established under the provisions of the act to regulate commerce. The railroad defended upon the ground that a rate so established was conclusive upon all the world until changed by the Interstate Commerce Commission; that no suit could be brought either at common law or under the ninth section, but that the complainant must begin his proceeding by filing claim before the Commission.

This contention was sustained by the Supreme Court in a convincing opinion. Said the Court: The fundamental purpose of the act is to prevent preference and discrimination. For this purpose it is required that rates shall be established and notice given to the public in a certain specified manner and that the rate so established shall be collected of all shippers alike. If, now, suit can be brought for a recovery of a portion of this rate in the first instance, either in court or before the Commission, at the election of the shipper, it may follow that one jury will determine one rate to be reasonable, another jury a second rate to be reasonable, while the Commission may be of the opinion

that still a third rate should be charged. This will of necessity produce the very discrimination which the act was intended to prevent. To give such a construction to the language of the ninth section would be to destroy the act itself.

It was held therefore in that case that the only remedy of a shipper for the payment of an excessive rate was to apply to the Commission, which, if it held the rate to be excessive, should order the establishment of a reasonable rate for the future and award damages to the complainant upon the basis of the rate so established.

Let it be carefully observed that this conclusion was not reached because the Commission was an expert body, more competent to determine the reasonableness of a rate than a jury; nor because the rate was filed in its office and under its direction, and could, therefore, be more conveniently ascertained and applied; nor for any consideration of expediency or convenience, but because the opposite holding would accomplish the very thing which the act to regulate commerce was intended to prevent.

This further situation might arise: If a rate has been pronounced unreasonable by the Commission and reduced, or if a rate has been voluntarily reduced by the carrier without any action of the Commission, may a shipper, with respect to a time anterior to the action of the Commission or to the reduction of the rate, maintain a suit in court for the payment of the excessive rate?

Apparently, the same reasoning which leads to the conclusion that application must be first made to the Commission in case of an existing rate would lead to the same conclusion with reference to a rate no longer in effect, for if such suits could be brought in court it might follow that one shipper would in fact pay one rate and another shipper another rate. Such is the conclusion of the court, which, on page 442, says:

> • • • Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of and awarding reparation to individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force.

And, again, on page 446, the following language is used:

> • • • And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one. In other words, the difference between the two is that which on the one hand would arise from destroying the uniformity of rates which it was the object of the statute to secure and on the other from enforcing that equality which the statute commands.

It appears, therefore, that whether the rate to be attacked is still in force or has been superseded by a lower or different rate, the complaint must be addressed in the first instance to the Commission, which is required to determine a reasonable rate and to award damages or reparation upon that basis. Whether, after the Commission has determined that a certain rate should have been charged during a given period, a shipper having paid the higher rate can begin suit in court in the first instance for the recovery of the excess, I express no opinion. It is evident that the discrim-

ination complained of would not arise provided the rate fixed by the Commission could in any way be made conclusive in the suit instituted in court. However that may be, it is clearly the right of the shipper under all circumstances to file his claim with the Commission in pursuance of the provisions of the ninth section, and it is clearly the duty of the Commission, in the opinion of the Supreme Court, to entertain the claim, prosecute the inquiry, *and award the reparation.*

I am unable to see any valid distinction between an excessive rate and a rule or practice for the distribution of coal cars like that involved in this proceeding. In each case the rate or regulation is of universal application. In either case to apply one rule to one shipper and another rule to another shipper must result in preference. In each case the Commission has power to inquire whether the existing rate or regulation is lawful and to prescribe another in substitution for the future. No reason is urged by the court in the *Abilene case* in justification of its holding there which would not apply with equal force in support of a similar holding here. That this must be so is no longer debatable since the decision of the Supreme Court of the United States in *Interstate Commerce Commission v. I. C. R. R. Co.*, 215 U. S., 452, by which it was affirmed that the authority of this Commission over a regulation for the distribution of coal cars is exactly the same as its authority over the rate of transportation itself.

The Illinois Central Railroad is a large carrier of coal and establishes, in common with other coal-carrying railroads, rules for the distribution of coal cars, in times of car shortage, between the different mines served by it. Complaint was made to the Commission that the method of distribution in force upon the Illinois Central resulted in unjust discrimination against the complainant. There was no question as to the manner in which the capacity of the mines was ascertained and the percentage to which each mine was entitled

determined, but it was asserted that certain classes of cars were not counted against the assignments of the mines to which they were delivered. In alloting cars the Illinois Central, according to its regulations, did not count private cars which were owned by the mine, foreign railway fuel cars which had been delivered to the Illinois Central by some other railroad for the purpose of being taken to a particular mine, and the fuel cars of that company itself which were used in transporting coal from the mine to the place where it was to be used by the railroad. The complainant contended that all these classes of cars should be counted against the assignment of the mine.

The Commission held with the complainant and made an order directing the Illinois Central to count all such cars in the future. That company conceiving this order to be unlawful petitioned to the circuit court for the northern district of Illinois for an injunction against its execution. Upon hearing that court was of the opinion that the order of the Commission was correct as to private cars and foreign railway fuel cars, but incorrect as to company fuel cars, and an injunction was accordingly issued restraining the operation of the order as to such company fuel cars.

From this the Commission appealed to the Supreme Court of the United States, which reversed the decree of the circuit court and sustained the order of the Commission in full.

The contention before the Supreme Court was that the only order which the Commission could make under the fifteenth section was one prescribing a rate or a rule, regulation, or practice affecting a rate; that this regulation, while the effect of it might be to prevent discrimination, was not a regulation affecting rates and therefore not within the power of the Commission to make. The court held that a regulation of this kind was within the terms of the fifteenth section; that, therefore, the Commission might prescribe the rule

which it did, and that such rule when prescribed would be binding upon the Illinois Central in its relations with all its coal mines.

This case determines that there is no distinction between an order of this Commission fixing the rate for the future and an order establishing a rule for the distribution of coal cars; and this being so, I am utterly unable to see any ground upon which a distinction can be made between the remedy which is open to the shipper for the recovery of damages in the two instances. If he must, in case of the excessive rate, apply to the Commission in the first instance, so in the case of the discriminating practice he must first make application to this body. To permit the institution of a suit in court until the rule has been fixed by the Commission would result in exactly the same discrimination and preference in case of the regulation touching the distribution of cars as it would in case of the excessive rate. It must follow as a necessary inference from this decision that courts are without jurisdiction to entertain in the first instance suits for damages resulting from the enforcement of improper rules for determining the capacity of its coal mines and the distribution of its coal cars in times of shortage between the different mines served. Any possible doubt upon this point has been laid at rest by the decision of the Supreme Court in *B. & O. R. R. Co. v. Pitcairn Coal Co.*, 215 U. S., 481, decided at the same time with the *Illinois Central case* just referred to.

The twenty-third section of the act gives a remedy through the district and circuit courts of the United States by mandamus in instances where a carrier is granting a preference in the movement of traffic or in the furnishing of cars or other facilities. The Pitcairn Coal Company, claiming that the Baltimore & Ohio Railroad was discriminating in favor of its competitor by the rules which it had established to govern the distribution of coal cars, began proceedings for manda-

mus against that company. It is not necessary to detail the various specifications of preference set forth in that proceeding. The general system of car distribution in vogue on the Baltimore & Ohio was analogous to that established by the Illinois Central, and the grounds of complaint, while more numerous in this case than in that, had mainly to do with the failure to count different classes of cars.

After an elaborate hearing upon the facts the circuit court sustained the contention of the relator, the Pitcairn Coal Company, upon a single item, denying in the main the prayer for relief. Upon appeal by the Pitcairn Company, the circuit court of appeals reversed the court below and held that the relator was entitled to the relief prayed for. The Supreme Court of the United States, upon appeal by the Baltimore & Ohio Company, decided that the circuit court had no jurisdiction under the twenty-third section, and that the suit should be dismissed. It placed its decision entirely upon the *Abilene case,* pointing out that there was no distinction between a rule or regulation of this character and a rate, and that therefore suit should have been begun in the first instance before the Commission.

It is therefore now determined beyond controversy that the complainant in the case before us could not at the time this complaint was filed have commenced in court, either at common law or under the twenty-third section, or under the ninth section, a suit at law, for a correction of the discriminations complained of or the recovery of the damages incident upon those discriminating practices. It must have applied to this Commission. How, then, can this body consistently decline to exercise the jurisdiction which is plainly cast upon it by the statute as interpreted by the court of last resort and refuse to pass upon its claim for damages?

The opinion of the majority indicates that com-

plaint may be made to the Commission, which will thereupon determine whether the regulation attacked is or has been in violation of law. If the Commission condemns the regulation, the complainant must then begin an independent suit in court for the recovery of his damages, upon the basis of the regulation approved by the Commission. The theory seems to be that the Commission has jurisdiction to prescribe the rule, but has no jurisdiction to award the damages which have resulted from failure to establish and observe a proper regulation in the past.

I express no opinion as to whether, if this Commission has definitely determined that a given rate or a given regulation for a definite period has been discriminatory or excessive and has prescribed the rate or regulation which will be reasonable or just, a shipper may or may not begin suit in court for damages based upon the rate established by the Commission. Such a rule would not be obnoxious to the objections found by the Supreme Court to the maintenance of the suits of the Abilene Cotton Oil Company and the Pitcairn Coal Company. It may be that such instances would present an opportunity for the alternative mentioned in the ninth section. I also think that a case like that of Joynes, where the act of the carrier is directed to a particular individual and does not consist of the enforcing against the public of a general rate, regulation, or practice, presents an instance where the party aggrieved may either sue in court or present his claim to the Commission. But this complainant must have begun before the Commission and the Commission should have jurisdiction to award the damages.

Upon what theory does the conclusion of the majority to the contrary rest? What is there in the language of the act which supports it? What is there in the structure of the act which lends countenance to it? To my mind both the language and the theory of the statute are directly opposed to it.

Nothing can be plainer than that Congress intended to confer upon this body the authority and to lay upon it the duty to award damages for infractions of the act. This idea runs through the entire framework of the statute.

Section 9 provides that the person damaged may apply to the Commission or may bring suit in court, but shall not adopt both remedies for the same violation.

Section 13 provides that if the carrier "shall make reparation for the injury alleged to have been done, such carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of."

Section 14 provides that "in case damages are awarded such report shall include the findings of fact on which the award is made."

Section 16 declares that if the Commission shall determine that any party complainant is entitled to an award of damages it "*shall* make an order directing the carrier to pay to the complainant the sum to which he is entitled, on or before a day named." The same section fixes the period of time within which claims for damage shall be filed with the Commission and within which suits shall be begun in court to enforce the orders of the Commission awarding damages. That section also prescribes in detail the legal proceedings by which an award of damages may be enforced against the defendant.

Up to the time of the *Joynes case* it had been, as is pointed out by Commissioner Lane in his dissenting opinion in that case, 17 I. C. C. Rep., 361, the uniform practice of the Commission to award reparation in all cases where damages accrued from a violation of the act.

It is said that the Interstate Commerce Commission is an expert tribunal and that the assessment of damages is not within the range of its expertness; that it

is an administrative body, and that the determination of damages is judicial and not administrative; all of which amounts to saying that the Commission is not qualified to deal with this question.

To this I am not prepared to assent. I can not admit that this body is not as well qualified as a traverse jury to assess the damages of these complainants. For years we have investigated, in one form and another, in all its ramifications, the business of mining and selling coal. We understand, as no jury without that knowledge possibly could, the effect of this discrimination upon the business of the coal operator. In my judgment the decision of the Commission would be more intelligent and less likely to be influenced by prejudice than that of a jury. But all this is entirely beside the mark; Congress, in set terms, has made it the duty of this Commission to award damages, and it is no concern of ours whether that provision of law is wise or unwise.

It is said that the Commission has no time to deal with such matters, and it certainly is true that its duties are various and exacting. But this, again, goes to the expediency, and that is not for our consideration; we can not decline to attempt to discharge the duties prescribed by the statute because it is inconvenient to do so.

The opinion of the majority holds that the complainant must first obtain from the Commission a finding that the regulation in effect has been discriminatory and determining what regulation ought to have been maintained; armed with this finding he may then bring suit in court for the recovery of his damages. It seems to me that certain practical difficulties will be found in the application of such a rule, one of which is suggested by the present case.

The complaint asks damages from 1903 to the present time. The Hepburn Act provides that suits for the recovery of damages shall only be entertained by the

Commission when filed with it within two years from the time the cause of action accrues, but it further provides that within a year from the passage of that statute complaints may be filed embracing all damages which had previously accrued. This complaint was seasonably filed to recover damages for the period named.

The complainant has diligently prosecuted its complaint, and now obtains a holding from the Commission that the regulation attacked is unlawful. If our order be made effective on June 1, 1910, it would follow that the complainant is then for the first time in position to maintain a suit in court.

But the order of the Commission fixing this regulation as to the distribution of coal cars is not of necessity final. It may be attacked in the courts by the railroad, and still another period of from one to three years may elapse before it is finally determined what regulation should have been in force during the period when these damages accrued.

What, now, is the rule to be applied as to the running of the statute of limitations? The usual period of limitation applicable to suits for the recovery of damages of this character is from three to six years. If the six-year period were to be applied the complainant has lost his damages for at least one year. Having seasonably begun his proceeding in the only forum in which it could be begun, and having prosecuted that proceeding with all diligence, he is, nevertheless, deprived of the right to the damages for a portion of the period.

It may be suggested that the filing of the complaint before the Commission may be regarded as the beginning of the suit which is subsequently brought in court. But there is no connection whatever between the proceeding before the Commission and the suit in court. All allegation as to damages for discrimination is immaterial and out of place before the Commission. And what of the competitors of the complainant who have suffered the same discrimination? Must these parties

all file suits before the Commission to determine the regulation which ought to have been observed by the railway, although the determination in one case must of necessity control in all cases?

It may be said that a complainant should begin two proceedings, one before the Commission to determine the regulation or practice and another in court for the assessment of his damages, and that the suit in court should be continued until the Commission has prescribed the rule. But the statute explicitly declares that while the party injured may begin either before the court or the Commission he shall not begin in both places.

The seventh amendment to the Constitution of the United States provides that in suits at common law where the value in controversy exceeds $20 the right to trial by jury shall be preserved. The effect of this constitutional provision, if any, upon the question before us, is yet to be determined by the courts.

The original act to regulate commerce provided that an order for the payment of damages should be enforced by the court sitting as a court of equity. Under this state of the statute the Commission held that it could not award damages, where a determination of fact was necessary, for the reason that the parties would thereby be deprived of their right to a jury trial. For the purpose of removing this objection the act was amended March 2, 1889, so as to provide that where suit was brought to enforce the Commission's order for damages either party might demand a jury trial. That the Commission understood that under the law as amended it could and should award damages appears from the following language, which occurs in the last case in which an award of reparation was refused upon this ground. *Rawson v. Newport News & Mississippi Valley Co.*, 3 I. C. C. Rep., 266, 279:

> As to the reparation claimed, prior to the amendment of the sixteenth section of the act to

regulate commerce of March 2, 1889, we held in several cases, that as the statute provided for no trial by jury in the courts to enforce our awards in controversies such as were triable at common law and where more than $20 was involved, we could award no reparation in consequence of the provisions of the seventh amendment to the Constitution of the United States. The amendment of the statute of March 2, 1889, was made to cover this feature of the statute, but the amendment expressly provides that it shall have no reference to proceedings pending at the time the amendment was adopted; and this proceeding was pending at that time.

In my own view a proceeding to recover damages for failure of a railroad company to publish and maintain a certain rate or regulation is not a suit at common law within the meaning of the seventh amendment. The legislature may prescribe either by itself or through a commission the rate or regulation to be observed. Neither the shipper nor the carrier has any right at common law to a particular rate, nor need the reasonableness of the rate prescribed by the legislature be submitted to a jury. The legislature might undoubtedly enact that the published rate or regulation should be binding upon all until changed. If now, it allows reparation with respect to the past it may do so upon condition that the amount shall be determined in a specified manner not involving a trial by jury.

The opinion of the majority makes no reference to the seventh amendment, nor do I see that the conclusion reached derives any support from that source, since that amendment must apply equally to the assessment of all kinds of damages. In awarding "rate" damages the Commission must determine the existence of certain facts, as the weight of the shipment, its character, the conditions of the billing, etc.; and these findings of fact may be conclusive upon the right of the

complainant to recover. If such findings must be submitted to a jury in one class of cases they must in the other.

The delays and expenses of the law are proverbial. Especially is this true where the defendant is a railroad company with unlimited resources. It is notorious that shippers forego claims which they believe to be just rather than incur the cost and annoyance of attempting to enforce them by law.

One cardinal purpose of the act to regulate commerce was to provide a speedy and inexpensive method by which the shipper could obtain relief in such cases. My own observation is that, to an extent, this expectation of the framers of the act has been realized. The complainant does ordinarily obtain his order for damages with less delay and outlay than in court, and the railroad generally pays the award.

The complainant claims to have been damaged by more than $100,000 through the discrimination which we have found to exist, and its evidence tends strongly to support that claim. A material part of these damages never can be recovered unless awarded in this proceeding, and that through no fault of the complainant, which seasonably began and has zealouly prosecuted its complaint. Days have been spent in the taking of testimony; all the facts are before us, and I strongly feel that we should proceed to assess and order the payment of these damages.

The opinion of McPherson, Judge, in *Morrisdale Coal Co. v. P. R. R. Co.*, 176 Fed. Rep., 748, which has come to my attention since the foregoing matter was prepared, fully sustains the position taken.

There are two other points to which I wish to call attention.

This record indicates that at times the number of private cars delivered to certain mines has exceeded the quota of those mines. Even if private cars had been counted against the assignment of those mines,

they would still have received more cars in proportion to their rating than the complainant.

In such case it seems to me that the railroad is guilty of discrimination, although it delivers to the mine only the cars which that mine owns. If, for example, a railroad only had sufficient cars for its own fuel supply the mine owner who did not sell coal to the company and who owned no cars himself, would obtain no cars whatever, while his competitor with an outfit of individual cars would be supplied. I do not think a railroad can lawfully devote its tracks and its motive power to the service of one mine, while declining to give to its competitor a similar service.

Probably, in the absence of contract provision thereto, a railroad would have no right to divert the cars of one mine to the use of another, but it might and should decline to put private cars into service except upon condition that there shall be no discrimination of this kind.

This may not be a matter of much importance in the present case. The use of private cars is growing less, and the question will, in all probability, never be a living one. I do not, therefore, care to discuss it, but wish simply to note my position. In the matter of car distribution every car should, in my opinion, be treated as though owned by the railroad upon whose line it is in service.

The rule approved by the Commission for the rating of mines takes account both of physical capacity and commercial sales; and this, I think, is correct. When, however, the output has been limited by inability to obtain cars, and when that inability has been due to the discriminating practices of the defendant, it is evident that the application of this rule perpetuates at the outset the effect of the past discrimination. The complainant, owing to this discrimination, has not been able to sell as much coal, in comparison with its competitor, as it otherwise would, and therefore its rating upon this basis is not what it justly should be.

For this reason it seems to me that it would be more just to begin upon the basis of physical capacity alone and subsequently introduce the factor of commercial sale, considering no sales which had been made under the discriminating rating.

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 7th day of March, A. D. 1910.

Present:

MARTIN A. KNAPP,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
FRANCIS M. COCKRELL,
FRANKLIN K. LANE,
EDGAR E. CLARK,
JAMES S. HARLAN,
} Commissioners.

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof; and it appearing that it is and has been the defendant's rule, regulation, and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage periods, to deduct the capacity in tons of foreign railway fuel cars, private cars, and system fuel cars, in the record herein referred to as "assigned

cars", from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all "unassigned" cars:

It is ordered, That the said rule, regulation, and practice of the defendant in that behalf unduly discriminates against the complainant and other coal operators similarly situated and is in violation of the third section of the act to regulate commerce.

It is further ordered, That the defendant be, and it is hereby, notified and required on or before the 1st day of October, 1910, to cease and desist from said practice and to abstain from maintaining and enforcing its present rules and regulations in that regard, and to cease and desist from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them.

And it is further ordered, That the question of the damages claimed by the complainant in this proceeding in respect of the matters and things in said report found to be discriminatory be deferred pending further argument in the premises.

I, EDWARD A. MOSELEY, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached and entitled Report and Order of the Commission are true copies of the originals now on file in the office of this Commission.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the Commission, this 18th day of August, 1910.

(Seal)

E. A. MOSELEY,
Secretary.

1.30 p. m.

Present: Parties as before noted.

CHARGE OF THE COURT.

Hon. Oliver B. Dickinson, *J.*

Gentlemen of the jury: The first impression, I think, which we are apt to receive in cases of this character is the one of their complexity and of their difficulty. There is in this case one very gratifying and refreshing feature. The case has been tried and defended not only with ability but with that spirit of candor and fairness which is always, with very few exceptions, the accompaniment of real ability. We have reason to be grateful for that, because counsel have met the questions involved in this case and presented them to you on the one side and on the other in such a way as to have removed all complexity from the case and reduced the questions upon which you will be called upon to pass to really very simple questions of fact. While they are thus simple in character, that unfortunately does not relieve you of the difficulties which surround their decision. But it is a great help and a long step toward your decision of them.

Now, the first thing you will want to know is what the question is which you are to decide, and what the case is which you are called upon to determine. Let us see if we can get that clearly in our minds.

This case arises out of acts of Congress which are known as the Interstate Commerce Law and the Elkins Act. The general purpose has been explained to you by counsel. They are really fair play laws. That is what they are. They are meant to enforce fair play to manufacturers, miners, and other producers; fair play to the business men who trade in the products of our manufactories and of our mines; fair play to the shippers who have occasion to use our railroads and

other transportation companies; fair play, at least incidentally and indirectly, to the people who are the ultimate consumers of these products; and fair play as well—and, indeed, this point may be emphasized—to these great transportation companies, which form such an important part of our industrial life.

Now, what is the general idea of them? Because it is well for you to get this thought in your minds in order that you may understand just your own relations to this case, why you are called upon to decide it, and the real spirit in which you will take hold of the performance of your duties. Now, the general idea is this: The necessity for the enforcement of the obligation of every one of these public utilities—for that is what they are—in the dealings of these transportation companies with those who have business with them, that the dealings shall be fair and their regulations, necessary to which to subject the business, shall be reasonable; the rates charged as compensation for the services rendered shall not be undue or unreasonable. You can realize at once the importanc of that, and therefore the importance of the duties which you as a jury have to perform. Take two men, for instance, who are in the same business upon the same line of railroad, the absolute necessity confronting each one, a necessity of the very existence of his business, that he shall be able to receive the raw material of his manufacture, and that he shall be able to ship his manufactured products to his customers. Suppose, for instance, that one of those men is not able to secure not merely that facility for the transaction of his business but that absolute necessity for the transaction of his business. You can see right at once that a system that involved unfair or partial distribution of cars, or other shipping facilities to him, would be a condition of things that would reek with injustice to the man against whom that discrimination was made. That part of it is simple enough. But while each one of these shippers is

entitled to his fair share, it is not as easy as it would seem to be on the surface to determine what his fair share is. You might say, in the first instance, that every man was entitled to his equal share, in the sense that he was entitled to the same amount of service. You could see in a glance that that would not do, because here is a man who might be in a business in which it requires him not to use more than a car or two a week, and another man or another concern in the business might be in a position in which it would be necessary for him or them to use ten or twenty or one hundred, or any number of cars a week. To distribute the cars, therefore, upon the basis of an equal distribution in numbers would be a business absurdity, and really as great an injustice as any other form of distribution which could be made.

Now, therefore, you have had in this case that element to which reference has been made or what has been spoken of as the capacity of these different mines, or their rating, and when we get that element into the case then you see that the distribution ought to follow that rating, and a man get his due share in that sense. So you can see the question becomes at once a complicated one.

Now, there are other elements that may enter into it. Here is a railroad company, for instance, which is in need of fuel. It cannot run its cars without it. It must procure its fuel from some producer, some mine, and of course it has the right to purchase, as everyone else has—and must have the right to purchase—its coal from any producer whom it may select, and it must have that right free and untrammeled. Now, therefore, the coal that is shipped in cars which are used for the purposes of the railroad alone, not for general commercial purposes, enter into it.

Now, there is another element that enters into it, and that is this: One man may have cars of his own in a considerable number. One man may be so situated that

he does not have any cars of his own. Cars that have been described here as private or individual cars. Now, the question of what is the fair share of each mine, you see, becomes a question of undoubted complexity, and you can see at once the real difficulty in determining just what the fair and reasonable share and proportion of each one is.

If at all times there were cars enough to supply every one up to the full capacity of his manufactory, or of his mine, then of course the problem would become very much simplified, but we all know that that is a practical impossibility, and there are times when we have what are called car famines. There are not enough cars to answer to all requirements. If one man gets an undue share, the other must be put off with less than the number that belongs to him. So that you see the question becomes a very difficult one. Now, in order that this business may be done, the railroad companies, the transportation companies, are of necessity bound to make some regulations, to have a system upon which this business may be transacted. They use the very best judgment that they can use. In a situation presenting the practical difficulties which you can easily see a condition of this kind does present, the transportation companies, acting in the best faith imaginable, using the very best judgment of the most highly trained men whose services they can secure, may nevertheless adopt or put in force a system which is found not in practical results to work out equal justice to all. The responsibility must be put upon them. It seems like a hardship, and in a certain sense it is one, but it is one of those necessary accompaniments of the difficulties which confront us in all phases of life. It is necessary to put upon them the responsibility of seeing that they make the proper kind of distribution, and if they do not and a shipper or other is damaged by reason of his not securing his fair share or his proper proportion, then as he is damaged—and as he is not responsible for

that loss or damage—it necessarily must be put upon and borne by the transportation company, and it must respond to his claim for damages.

You see, therefore, that when you come to the decision of this case it obviously calls upon your sense of fairness and justice, for if a man has been damaged he should be permitted to recoup himself for the real loss that he has sustained. But he is not entitled to more than what his real damages are, as the railroad company is compelled to respond only to that claim. It would be obviously unjust that that claim should be increased to anything beyond what is fair and just.

Therefore, you see the first question is the necessity to have some tribunal which will decide whether a given rule or regulation or system or mode of distribution by these transportation companies is reasonable and is fair, or is unjust and what has been called discriminatory. In other words, is it a proper rule or an improper rule? Some tribunal must decide that question, because we cannot get anywhere until it is decided. That is perfectly clear.

Now, the law might confide the decision of that kind of a question to you gentlemen of the jury, but you see the trouble there would be in submitting it to a jury. You are trying a case here today about a regulation. It might seem to you that that regulation was fair or that it was discriminatory and unjust. Another jury in New York, or perhaps in California, or in any other district in the whole United States, might have the same question before them. It might look to them in a different way from what it looked to you. Then what would be the result? Why, you would have one kind of a law in one case and another kind of a law in another, and you see that would not do. It would not do to have one man recover on really the same state of facts and another shipper be unable to recover. The railroads nor the shippers nor anyone else would be able to tell what the proper rule, what the proper reg-

ulation, what the proper system, was. It is necessary to have that uniformly applied alike in all cases and to all shippers and all railroads, the same rule, and therefore the necessity for having it decided by one tribunal, and the people, for the purpose of accomplishing the purposes of this law, have established that tribunal, and it is the one to which you have heard frequent reference made here as the Interstate Commerce Commission.

Questions of that kind are called administrative questions. The Interstate Commerce Commission, and the Interstate Commerce Commission alone, can decide that class of questions, and when it decides them they become as much the law of the land as if they were written into an act of Congress, and everyone of us is bound by it.

Now, you have another thing which it is necessary to decide. You may have your rule—that is the law of the case; you may have the proportion of cars to which an individual shipper is entitled under the law of the case, as established by the Interstate Commerce Commission; and you may know all of that, but here is John Smith who comes with a claim and nobody knows whether he actually did get the cars to which he is entitled or not. The Interstate Commerce Commission, or the law of the case—in his case before us—would tell us to how many he is entitled, or give us the rule by which we can find out, but this law could not tell us whether he had in fact obtained those cars or not. Now, how are you going to decide that question? Somebody must decide that question also. The law has provided for that, and anyone who claims that he has been discriminated against, if he wants to test the question of whether the rule of distribution is discriminatory, unreasonable, unjust, or fair and reasonable and proper —if that is what he wants to do—he must go before the Interstate Commerce Commission, because they are the only people who can decide it. But if after the

rule has been determined, and the number of cars to which he is entitled, or the rule by which that can be determined, has been found, and he comes in complaining about a shortage, and the only real question is whether or not there was a shortage in his particular case, that you see is a simple, plain question of fact, and it can be determined in one of two ways. The man can bring his action in court, just the same as you would sue a man for damages if he had made a contract with you and broken his contract, just the same as you would bring your action against a trolley company or a railroad company where through its alleged negligence your person had been injured or property had been damaged. You bring the suit in precisely the same way. You would submit your case to the jury in the same way, and you would have it decided in the same way. He can do that in the first instance, or he is given the privilege at his election of submitting all of those questions to the Interstate Commerce Commission. So that they pass upon the question of discrimination, and they pass also upon the question of damages.

Now, that has been done in this case, and the Interstate Commerce Commission has passed upon all of those questions. Therefore, the inquiry would at once arise in your minds, or anybody else's, "Well, if it has already been decided what are we to do?" Just let me explain what you have to do. The people of the United States have time and again declared that when a question of fact comes to be decided their preference is and their insistence is that it shall be decided by a jury of the land. The people might submit it to lawyers, a tribunal of lawyers, or of judges, or of this Interstate Commerce Commission, or appoint an arbitration board, or they might do it in any way in which they decide to do it, but the people of the United States have said, "No; every question of fact of that kind our will is shall be decided by a jury." Now, that brings the question to you.

The situation, then, is simply this: The Interstate Commerce Commission has inquired as best they could, from all the light they had, into this question, and they have decided what the proper rule of distribution is. By that we are bound. We must take their ruling on that. It cannot be questioned, and it is not questioned, in this case. Another thing is that they have decided the amount of the damages in this case. What is the effect of that? The effect of that is this: A man or a corporation against whom it is found has the right, if he chooses, to pay it, if he thinks the amount is correct, and if he pays it that is the end of it. There can be no further claims made upon him. But the law does not require him to pay it, and if he thinks that there has been a mistake made, or if he thinks that the amount is unjust, or if he thinks he has any good reason for refusing to pay it, the law gives him the right to refuse and justifies him in refusing, and he need not pay it, and that tribunal is without power to enforce its payment merely because it decided that it was due. Then what? Then the party in whose favor the award is made may bring his action and submit his claim to a jury, just such a jury as you are, and that jury passes upon the question of what the amount should be.

Now, the findings of the Interstate Commerce Commission are made evidence. That means that you are to be informed what its findings were. All the evidence that was before it has by the stipulation of counsel in this case—and on both sides they are to be commended for having met this question fairly and for having shortened your labors as much as possible—they have permitted everything that was before this Commission to be known to you. So that you have the decision of that tribunal—you have the testimony which it had before it, before you, precisely the same as if the witnesses had come here and testified to the facts.

In addition to that, other witnesses have been called, and you have heard their testimony, and it is

brought home to you now to decide this question. The law makes it evidence. It is not conclusive evidence. It does not bind you or your judgments. The Interstate Commerce Commission, of course, we all appreciate, deserves the high tribute which has been paid to it by counsel, paid to it as a tribunal by counsel, paid to the personnel of that tribunal, and the law makes its findings evidence, and of course it is entitled to our most respectful consideration. It is entitled to all the weight which you would give to any other credible evidence that came before you from the most highly respectable source from which evidence could come. You are to consider it just as you would consider the sworn testimony and evidence in this case coming from credible witnesses and from a highly respectable source. You are to consider all this as evidence in the case. But, gentlemen, you are to decide this case according to your own conscientious judgments. So far as this evidence affects your judgments, so far as the arguments addresed to you by counsel move your minds to one decision or the other, that honest conscientious leaning to one side or the other, you are to follow it, but your verdict is to be your verdict and reflect your judgment upon the facts in this case.

Now, I have said they were very simple. Let me see if I can make clear to you just what the question is and the fact that you have to decide.

There are two cases here before you. You are to decide each case as if that was the only case that was before you. I have already explained to you why you have the two cases, and the reason for having two instead of one. I will repeat it in case it may have escaped your attention or faded from your memories since it was stated. There was a firm engaged in the mining business known as the Bulah Coal Company, I think, or some such name. The absolutely correct name is unimportant for the purpose of expressing the idea. That was a firm, a partnership. It was made up of cer-

tain individuals. They had shipping transactions with the Pennsylvania Railroad, the defendant in this case, which extended over a number of years. I think the time was from some time in 1902 until some time in 1904. One of the members of that firm died. As you all know, the effect of a death of a member of a firm is in a sense to end that firm. The firm was what is known as dissolved by death, and the surviving partner proceeds to wind up, as it is called, the affairs of that firm. That firm being in that situation, another firm was formed and someone else was brought in as a partner. They adopted, as they had the right to do, the same name. They succeeded, as they had the right to succeed, to the same business, and I have no doubt, for all practical purposes, they went on the same as before. But you will see in strictness the first firm was made up of two people, and the second firm was made up of two people. One man was a member of each firm, but the other member was a different member. So the interests were divided, and that is why we have the one-period and the two-period, to which reference has so frequently been made.

Now, we will take the first period. Let me say to you that counsel for the plaintiff, for the purpose of simplifying this case before you, are asking for no damages except those which are embraced in two elements, and they having restricted their claim to those two things of course we need not bother ourselves with any other possible damages which at least theoretically they might have suffered. We will confine our attention to the two to which they ask us to direct our attention.

Now, what are they? One is this, that during this first period, from 1902 to 1904, they did not receive their due allotment of cars. As I understand the situation, there is no dispute about that fact, and you need not trouble yourself about it. They say that that resulted in damage to them, and there is no dispute about that proposition, for it is admitted that it did result in dam-

age. So that simplifies it, and we are down to the simple question of how much. Now, how much would depend, of course, upon the extent of the shortage, and here again you are relieved of all trouble of inquiry—and you will see how the question becomes a more and more simple one—because the parties on both sides, in that same spirit of fairness and in that same effort to relieve you of unnecessary labor, raise no dispute about the amount. That is claimed to be 9,523.68 tons, and the defendant says, "Well, we will not raise any question about the amount. It may be exactly right, or it may not be, but we will relieve the jury of that." So you may consider that if they had received the number of cars to which they were entitled they would have been able to ship during that period 9,523.68 tons more than they did ship.

Now, here comes in another question. We are in the United States Court. We are administering the laws of the United States. There are certain things which pertain to the jurisdiction of the United States and certain things which pertain to the jurisdiction of the different states in which we may live. We, for instance, have our State transactions, occurring within the State of Pennsylvania. We have what are called our inter-state or national transactions, which take place across State lines. Now, we are concerned here only with those transactions which have crossed State lines, and here again you are relieved of any trouble of inquiry for the parties are in accord upon the proposition that the shortage in inter-state transactions was 3,878.4 tons, or close to 3,900 tons. You have that fact, and you need not trouble yourselves with another. These people, if they had received the cars to which they were entitled, would have shipped in inter-state transactions 3,878.4 tons of coal more than they did. Now, they did not ship it, and the railroad company must pay the loss or damage which resulted to them by reason of it.

Now, what is the damage? In the first place, they say, "If we had mined, sold and shipped that coal we would have received a profit upon it." Therefore, the question is how much would have been their profit, because clearly the loss of that profit is a damage. The first thing you want to know in your figuring on profits is what is the gross profit which they could get for their product; secondly, how much does it cost to produce it. Now, what they get is not their price, that is clear; their profit is the difference between what they get and what the thing costs to produce. Now, here again you are relieved of the trouble, and the problem is further simplified for you, because the parties raise no question as to the selling price. It was $1.598. The parties do not question the correctness of those figures; so you do not have to inquire into that.

Now, the next question is what did it cost to produce. There is the controversy between these parties. That is the fact, the simple fact, which you are to decide. During that period, 1902 to 1904, what was the fair cost for producing this coal? The plaintiff says it was 88 cents, and they point to the evidence—and I do not care to take the time to go over it, because it is unnecessary; it has been fully and ably discussed by counsel, and that argument was addressed to you by the plaintiff for the purpose of convincing you that the fair cost of the production of that coal during that period was 88 cents a ton. If it was, then the difference between $1.598 and 88, or 71.8 cents is the profit, and if that is the right figure, then of course every man's common sense would tell him to just multiply that by 3,878.4 tons, and you have that element of damage resulting in $2,784.41.

Now, of course, gentlemen, in every case you are not done with it when you hear one side. You get that one clearly in your minds. That is perfectly simple and perfectly clear, and that the question for you to consider is "What was the fair cost of producing

this coal?" I have given you what the plaintiff says about it. Now, the defendant says that that is too low; that it could not have been produced for that; that they could not have received as large a profit as 71.8 cents on every one of these tons. That it would have been less than that; and they say—and that was the purpose of calling Mr. Hatfield as a witness before you—he says that the fair cost instead of being 88 cents was $1.19, and while it is admitted that there was a profit, and admitted that there was a damage, the profit and consequent damage was not 71.8 cents but it was 40.8 cents a ton. Now, if the profit was only 40.8 cents a ton, and the plaintiff is entitled to only the profit in this feature of the case, then of course the damage would not be 3,878.4 tons multiplied by 71.8 cents, but it would be 3,878.4 tons multiplied by 40.8 cents, and the amount would be $1,582.22 as against $2,784.41. I think, gentlemen, that that is clear.

Now, you see this whole case, complicated as it seemed when we started, so far as this element is concerned, is brought down to that simple question of fact for you to decide, what was the fair cost of producing that coal. Could it have been produced for as low as 88 cents, as the plaintiff says, or would it have cost $1.19, as the defendant says, or what in your judgment would it have cost? That gives you that item.

Mr. Roads: May it please your Honor, may I interrupt your Honor? Didn't you make a mistake there? It is four cents, the difference between $1.19 and $1.23.

The Court: You have your mind, Mr. Roads, on the cost, not on the profit. You are speaking about the cost. That is the element to which I come now. After you hear this if you do not agree with me, let me know.

Now, there is another element of damage. The loss of profit is not the whole damage. That is this, that if a man equips his manufactory, or his mine, or anything else, for the purpose of putting out a certain output, and somebody interferes with him and cuts down his

output, and his cost expenses run on just the same as if he were getting out his full product, the cost per unit in tons, or whatever else it is, would of course have increased. That is so obvious that it is not necessary for me to more than state it.

Now, the plaintiffs say, "We were damaged beyond the loss of profits by the fact that the coal we did get out, the reduced amount, cost us more than it should have cost us." Here again the parties have relieved you of the labor of figuring on it by agreeing, or at least having no dispute over the proposition, that it did cost them $1.23 for the quantity of coal that they put out. Now, if they had been given their full quota of cars, what would it have cost them—not in the aggregate, understand, but per unit ton—what would it have cost them to have put out the increased amount. The plaintiff points to the finding of the Commission as part of its proofs, and all the other proofs that they have adduced before you, and to which counsel has called your attention, and they say that the cost would have been 88 cents, just what the cost in the other case was. What is the result? They were compelled to submit to a unit cost of $1.23. If they had received what belonged to them, their unit cost would not have been more than eighty-eight cents. In consequence they have been damaged by that excess, or 35 cents a ton. Therefore, all you have to do is to determine how many tons were shipped, and here again you limit it to interstate commerce. How many tons were shipped in interstate commerce? The parties agree upon those figures. If plaintiffs were put to an additional cost of 35 cents a ton, and they shipped so many tons, then their damage in this respect would be 35 multiplied by the number of tons, which they foot up to $15,807.07, and they add those two elements together, and that is what makes their total claim of $18,591.48.

Now, here again there being controversy we will see what the other side has to say. What do they say?

They say again—and here the testimony of Mr. Hatfield is introduced, and the other evidence that they have offered, all going to persuade you that the real cost would have been not 88 cents but $1.19. So that the defendant says, "Your cost damage as you figure it is entirely too high. It cost you $1.23. Very well, we will accept your statement on that. But it would have cost you not 88 cents, but $1.19." Now, the difference between $1.23 and $1.19 is not 35 cents, but it is 4 cents, and you simply multiply the same number of tons shipped in interstate commerce by 4 cents instead of 35 cents, and you get their estimate of this damage as $1,806.52, as contrasted with $15,807.07.

I assume that is right, Mr. Roads. I have not heard you say it was wrong.

Mr. Roads: That is right, if your Honor please. I thought you were treating with that branch of the damage.

The Court: Then, we are agreed as far as the figures go, that that is right.

Now, there, gentlemen, you have your contrast on the first claim. The plaintiff foots up a total claim of $18,591.48, made up of these two items, and the defendant, taking the same elements, foots up a total of $3,388.74. Those are the two simple questions of fact that you are to decide under the evidence in this case, and it all, you see, resolves itself into the one question of what was the fair cost of producing this coal, and the rest is a mere matter of simple calculation after you have once determined that.

Now, we come to the second period, and we have substantially the same sort of a division there. First, the division into profits, the element of lost profits, as part of the damage, and the element of increased cost as another part of the damage, and you take it in that same way, although the figures vary for that period. The parties again have relieved you of the labor of finding out what the price was by agreeing that you

may take it at $1.132. Now, the question is what did it cost to put it out, and here again you have a difference of opinion. The plaintiffs says that the cost in the second period was the same as the cost in the first period, or 88 cents, and consequently the lost profits is the difference between the $1.13 and the 88 cents, or 25.2 cents a ton. Now, you multiply that by the number of tons of coal which would have been shipped in interstate commerce—did the parties agree upon the number—plaintiffs make that item as an item of $12,232.17 in the second case. That is the item of lost profits. Now, in the same way they take the increased cost to which they say they were subjected, and here again there is an agreement that the actual cost was $1.08 for that period. They say the proper cost should have been the same as it was in the first period, or 88 cents, and consequently they have been put to damage because of the increased cost of 20 cents a ton. For the purpose of this calculation you may take the figures 97,417—and there is no dispute as to that—which makes a total damage in this respect of $19,683.40. That makes the total claim of the plaintiff for the second period $31,715.57.

Now, you have precisely the same kind of a difference between the parties here again. They take the same price, $1.132. The question is upon the proper cost during the second period. The plaintiff, as I have said to you, says the proper cost was 88 cents. The defendant says they could not have produced it under a dollar, and they have brought all their evidence before you for the purpose of convincing you of that. If the cost was $1.00, then the lost profit was the difference between $1.132 and $1.00, or 13.2 cents, and that multiplied by the total would give you the damage, which on the basis of the same tonnage which the plaintiff adopts would be $6,407.28.

Now, in the same way they take the increased cost. They start with the same figure, that the actual cost is

$1.08. The plaintiff says that the proper cost, if they had been supplied with the cars that they should have had, they could have put it out for 88 cents instead of $1.08. The defendant says, "No, you could not; it would have cost you $1.00", the same as in the other case. So that their loss there, instead of being 20 cents a ton on that item of increased cost, would be eight cents a ton, and therefore the damage on that item could not have exceeded $7,793.36, as contrasted with $19,483.40, or a total of $14,200.64 as contrasted with a total claim on behalf of the plaintiff of $31,715.57.

Now, gentlemen, there is another question in this case, and that is this: There is a dispute as to the tonnage between these parties to this extent, and that bears also upon this question of cost, and the defendant presents to you this view of it: They figure up—and I will only give you the round figures instead of going into the actual figures, because they are somewhat confusing, but it will give you the idea—the defendant presents this view of it, that the actual total cost of the tonnage which was put out amounted in round figures to $136,000. If the increased tonnage could have been put out at 88 cents, then the total cost instead of being $136,000 would have been only $105,000. The defendant, therefore, presents that view to you.

Let me see if I can make it clearer by a simpler illustration, and taking small figures, because these large figures are a little confusing. Suppose a man is manufacturing or producing anything, and his total cost for producing it is $123. Now, you inquire how many units of product he has put out, how many anything, no matter what it is, and you find out he has put one hundred. Now, $123, that it has cost him, divided by one hundred, would give $1.23 per unit, when it has cost him $123 in the aggregate. Now, suppose you increase his units to one hundred and twenty, and you find that according to his calculation that his aggregate cost instead of increasing, as you would naturally ex-

pect it to do, in accordance with the increased output, or if it did not increase it would be difficult to understand how it would decrease—and you find that his aggregate cost instead of being $123 has been cut down to $105. You say, "How can that be? I can easily understand that if a man spends $123 to put out one hundred things his unit cost is $1.23 for each one. That is clear enough. If he only puts out fifty, then his cost for each one is double that. If he puts out two hundred at the same cost, then his cost per unit is half of the $1.23. That is clear enough. But if it costs a man $123 to put out one hundred, how can he possibly put out one hundred and twenty for $105?" Your conclusions would be that there was something wrong in the calculation of unit costs. You must have it too low. That is the question for you to determine in this case, because it bears upon both the aggregates of this claim and bears upon the unit cost, and therefore we have the testimony which has been adduced before you to show that there is an inaccuracy in the claim presented by the plaintiff in that respect. Of course, gentlemen, while as a mathematical proposition that is obviously true, and that mathematically speaking it would be absurd for a man to say that he could produce one hundred things for $123 but if he increased his output to one hundred and twenty, produced twenty more of the same things in the same way, he would cut down his aggregate cost from $123 to $105. But you are to consider the argument addressed to you by counsel upon the other side, and their explanation of that phenomenon. I do not pretend to present all of it to you, but just enough to give you an illustration. Take a man who is shipping coal, for instance, and all his cars come to him in a regular way at the times at which he may employ his men right at once in filling them, getting them out of the way, bringing empties in and filling them and getting them out of the way, the result would be that he could get the amount at a unit cost of a certain amount

per ton, but if he had the men there and their wages going on and all the other expenses going on, and they were standing there idle doing nothing for an hour or two hours or three hours, or there were breaks and interruptions in the continuity of his work in the one case, then it would be easily understood that under one condition of work it might cost the man $123 to get out one hundred tons, and under the other more favorable conditions of work he might be able to get out one hundred and twenty tons at an aggregate cost of $105.

So you see the whole case turns upon really these two questions of fact, which you as a jury are to determine. The one in the first period—and that is really the only question there—the real and proper cost to which the plaintiff would have been subjected in getting out this additional tonnage to which it is agreed they were entitled; and in the second place to the questions of fact as to the same cost again, and bearing upon that, and important in itself, the quantity of the tonnage. So that this case, which at the outset started to be so complicated and so difficult, you will see resolves itself into these simple questions of fact.

Now, if you find for the plaintiff you will include in your verdict such an amount as will compensate him for this difference. It has been some time since the damage was done. Had he received his money then when the damage was freshly done, all he would have been entitled to would have been his damage, but some time has elapsed, necessarily elapsed—and you are not to attach any blame to anybody for that; the problem submitted to the Interstate Commerce Commission was a very complex and difficult problem, and it took a long investigation to determine just what the facts really were; it was nobody's fault that they were not paid at once, because nobody could know then what the damages were, but that is not the fault of any one, and it is not the fault of the plaintiff, and therefore you are to put him back by your award now in the same posi-

tion as if you had given him the amount of damages at the time at which he was entitled to them.

Now, how are you going to level that up? Why, that is very simple. You take the amount, and you allow him such an additional sum in the way of damage as would make up for that difference in time. It could not exceed legal interest. It may be whatever in your judgment will make up the difference between the amount which he receives to-day as contrasted with having received it at the time the injury was done. Is there any dispute about the date?

MR. BIKLE: No dispute about the date.

THE COURT: The date, then, is June 28th, 1907, and you will take that date. In other words, you find the damages as you think they were on June 28th, 1907, and then you add to it such sum as in your judgment will make the money received now the equivalent of that received on June 28th, 1907. That must not exceed six per cent. interest.

I think I have gone over the subject matter of all the different points submitted to me. So far as they are affirmed in the general charge, they are affirmed; and so far as not affirmed in the general charge, they are disaffirmed, and counsel if they choose may call my attention to any specific point which they would like to have specifically answered.

MR. ROADS: If your Honor please, on behalf of the plaintiff we would request you to charge the jury that the findings of the Interstate Commerce Commission are prima facie evidence, and the effect of that rule.

THE COURT: Gentlemen of the jury: I have already adverted to that in my charge. I will repeat it. The law makes the findings of this tribunal evidence. It is what we call prima facie evidence. That is, there is no reason appearing why you should not credit it and why you should not believe it in the first instance. Therefore, until it is answered it is what we call prima

facie evidence. In other words, on the face of it you would credit it if you did not hear anything to the contrary. But the law does not make it conclusive. It is not binding upon you. You take it as evidence. If it convinces you of its truth, considered with all the other evidence in the case, then you follow it precisely as you follow the testimony of a witness if it convinces you. But you take into consideration what is said upon the other side, and you consider all the evidence, and make up your own minds upon these questions of fact that I have submitted to you.

MR. BIKLE: In the first period we do not dispute the lost tonnage, only the cost. In the second period we dispute the correctness both of plaintiffs' cost figures and also the tonnage. We ask that the Court so charge.

THE COURT: Now, gentlemen, I want to make that clear. In the first period there is no question of the tonnage raised. The defendant concedes the amount of the tonnage, and the difference is all over the cost. So you need not trouble yourselves there with any other question than the cost question. In the second period the claim is questioned in two respects, the cost, just as it is in the first period, and the tonnage is also questioned. So of course you cannot determine the amount of damage until you have settled both of those questions.

I understand that the parties have agreed that their respective statements of their positions may be sent out in order to save the jury the labor of making calculations? Is that correct?

MR. GLEASON: Yes, sir.

MR. BIKLE: Yes, sir.

THE COURT: So, gentlemen, you will have the benefit of the figuring of the parties on each side, which will present these respective views. You will take the case and dispose of it.

Counsel for the plaintiff except to the answer of the learned trial judge to the request to charge concerning the fact that the findings of the Interstate Commerce Commission are prima facie evidence, and the effect of that rule.

(Exception noted for plaintiff, by direction of the Court.)

Counsel for the defendant except to the refusal of the learned trial judge to charge as requested by them in such points as were not affirmed.

(Exception noted for defendant by direction of the Court.)

Counsel for the defendant except to the following portion of the charge of the learned trial Judge:

> "Now, gentlemen, there is another question in this case, and that is this: There is a dispute as to the tonnage between these parties to this extent, and that bears also upon this question of cost, and the defendant presents to you this view of it: They figure up—and I will only give you the round figures instead of going into the actual figures, because they are somewhat confusing, but it will give you the idea—the defendant presents this view of it, that the actual total cost of the tonnage which was put out amounted in round figures to $136,000. If the increased tonnage could have been put out at 88 cents, then the total cost instead of being $136,000 would have been only $105,000. The defendant, therefore, presents that view to you.
>
> "Let me see if I can make it clearer by a simpler illustration, and taking small figures, because these large figures are a little confusing. Suppose a man is manufacturing or producing anything, and his total cost for producing it is $123. Now, you inquire how many units of prod-

uct he has put out, how many anything, no matter what it is, and you find out he has put one hundred. Now, $123, that it has cost him, divided by one hundred, would give $1.23 per unit, when it has cost him $123 in the aggregate. Now, suppose you increase his units to one hundred and twenty, and you find that according to his calculation that his aggregate cost instead of increasing, as you would naturally expect it to do, in accordance with the increased output, or if it did not increase it would be difficult to understand how it would decrease—and you find that his aggregate cost instead of being $123 has been cut down to $105. You say, 'How can that be? I can easily understand that if a man spends $123 to put out one hundred things, his unit cost is $1.23 for each one. That is clear enough. If he only puts out fifty then his cost for each one is double that. If he put out two hundred at the same cost, then his cost per unit is half of the $1.23. That is clear enough. But if it costs a man $123 to put out one hundred, how can he possibly put out one hundred and twenty for $105?' Your conclusions would be that there was something wrong in the calculation of unit cost. You must have it too low. That is the question for you to determine in this case, because it bears upon both the aggregates of this claim and bears upon the unit cost, and therefore we have the testimony which has been adduced before you to show that there is an inaccuracy in the claim presented by the plaintiff in that respect. Of course, gentlemen, while as a mathematical proposition that is obviously true, and that mathematically speaking it would be absurd for a man to say that he could produce one hundred things for $123 but if he increased his output to one hundred and twenty, produced twenty more of the same things in the same way, he would cut down his ag-

gregate cost from $123 to $105. But you are to consider the argument addressed to you by counsel upon the other side, and their explanation of that phenomenon. I do not pretend to present all of it to you, but just enough to give you an illustration. Take a man who is shipping coal, for instance, and all his cars come to him in a regular way at the times at which he may employ his men right at once in filling them, getting them out of the way, bringing empties in and filling them and getting them out of the way, the result would be that he could get them out at a unit cost of a certain amount per ton, but if he had the men there and their wages going on and all the other expenses going on, and they were standing there idle doing nothing for an hour or two hours or three hours, or there were breaks and interruptions in the continuity of his work in the one case, then it would be easily understood that under one condition of work it might cost the man $123 to get out one hundred tons, and under the other more favorable conditions of work he might be able to get out one hundred and twenty tons at an aggregate cost of $105."

(Exception noted for defendant by direction of the Court.)

Counsel for defendant except to the following portion of the charge of the learned trial Judge:

"In other words, you find the damages as you think they were on June 28th, 1907, and then you add to it such sum as in your judgment will make the money received now the equivalent of that received on June 28th, 1907. That must not exceed six per cent. interest."

(Exception noted for defendant by direction of the Court.)

Counsel for defendant except to the charge of the learned trial Judge in that it was inadequate in failing to call to the attention of the jury the evidence introduced by the defendant tending to establish the number of cars to which the plaintiffs were entitled under the rule of distribution prescribed by the Interstate Commerce Commission.

(Exception noted for defendant by direction of the Court.)

Counsel for defendant except to the charge of the learned trial Judge in that it was inadequate in failing to call to the attention of the jury the method which must be pursued in determining the number of cars to which the plaintiffs were entitled under the rule of distribution prescribed by the Interstate Commerce Commission.

(Exception noted for defendant by direction of the Court.)

The points submitted are as follows:

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 2422. December Term, 1912.

JAMES H. MINDS, surviving and liquidating partner of JAMES H. MINDS and WILLIAM J. MATZ, lately trading as the BULAH COAL COMPANY,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

DEFENDANT'S POINTS.

1. The present action is brought by the surviving and liquidating partner of a partnership to recover the amount of an award by the Interstate Commerce Commission in a proceeding instituted before that

body after the dissolution of the partnership by the plaintiff as such surviving and liquidating partner to recover damages claimed to have been sustained by the partnership, due to alleged unjust discrimination prohibited by the Interstate Commerce Act, to which it had been subjected by the defendant. The cause of action asserted before the Commission did not survive the dissolution of the partnership, and consequently was not legally maintainable after such dissolution, and the plaintiff cannot consequently recover in the present action.

2. In the proceeding brought before the Interstate Commerce Commission, the plaintiff in the present action was not entitled, as surviving or liquidating partner of the partnership formerly existing between himself and William J. Matz, to recover damages on account of any injury which may have been sustained by William J. Matz, as such partner because of the alleged unlawful discrimination complained of in that proceeding, and the award, therefore, made by the Interstate Commerce Commission in favor of the plaintiff, as surviving and liquidating partner of the said partnership, was invalid, in so far as it directed payment to be made to the plaintiff of damages on account of injuries sustained by the said William J. Matz as such partner.

3. It appears that the partnership existing between James H. Minds and William J. Matz, trading as the Bulah Coal Company, was dissolved by the death on April 12th, 1904, of William J. Matz, and that subsequently, to wit, on October 5th, 1904, an agreement of partnership was entered into between the said James H. Minds and Julia A. Matz, which by its terms was to date from April 12th, 1904. Any cause of action, therefore, that James H. Minds could assert as surviving or liquidating partner of the partnership

composed of himself and William J. Matz, to recover damages claimed in the proceeding before the Interstate Commerce Commission, was necessarily confined to the period antedating April 12th, 1904.

4. It appears that the award of the Interstate Commerce Commission which forms the basis of the present action covered a period extending beyond April 12th, 1904, and down to October 1st, 1904. The award, therefore, covers a period of time in which damages were not recoverable by the complainant in the proceeding before the Commission, and the award, therefore, was invalid, and the amount thereof is not recoverable in the present action.

5. There is no evidence which would justify the jury in determining how much of the award made by the Interstate Commerce Commission is properly referable to the period prior to April 12th, 1904, and in the absence of evidence on this point the jury cannot guess at the amount which is referable, and cannot, therefore, in the present action render a verdict for the plaintiffs for more than nominal damages.

6. The findings of fact of the Interstate Commerce Commission which have been put in evidence are not binding or conclusive. If the testimony in the case has shown that they are incorrect or erroneous, they should not be considered by the jury.

7. The burden is upon the plaintiffs to establish all facts necessary to a recovery, and one of these facts is the loss, if any, sustained by them as the result of the failure of the defendant to deliver the additional cars which the Commission has found should have been delivered to them.

8. The Commission found that in the period of the action the plaintiffs received cars sufficient to enable

them to ship 110,892 tons of coal, and that they should have received cars which would have enabled them to ship 9523.68 additional tons. There is no evidence in the case to contradict the correctness of these findings, and they are consequently to be accepted by the jury as correct and controlling.

9. The Commission found that it cost the plaintiffs on an average $1.23 per ton to mine and ship the coal produced and shipped by them in the period of the action, and that if the additional 9523.68 tons had been mined and shipped this average cost would have been reduced to 88 cents per ton. The correctness of this finding is disputed, and it is for the jury consequently to determine whether the finding is correct or incorrect.

10. The aggregate cost of the 110,892 tons actually mined and shipped, under the Commission's finding of an average cost of $1.23 per ton, was $136,397.16. The aggregate cost of mining and shipping 120,415.68, the total tonnage that should have been shipped under the Commission's finding, based on average cost of 88 cents per ton would be $105,965.68. The Commission's finding or conclusion is, therefore, manifestly erroneous unless under the evidence in the case the jury would be justified in finding that not only would the additional 9523.68 tons have been mined at no additional cost to the plaintiffs, but that as a result of the mining of this additional coal the cost actually incurred in mining the 110,892 tons would have been reduced. Under the evidence in the case the jury would not be warranted in assuming that such would have been the result of the mining of the 9523.68 additional tons, and consequently the jury would not be justified in accepting as correct the Commission's estimate of 88 cents as the mining cost had the larger output been mined.

11. The evidence has shown that if the plaintiffs had mined the 9523.68 additional tons they would have

been obliged to pay for each ton the miners' wages, which would have been 62 cents a ton prior to April 1st, 1903, and 66 cents a ton thereafter, and a royalty of 10 cents a ton. Upon the basis of an average mining charge for the period of 63 cents a ton, the additional cost that the plaintiffs would have been subjected to had they mined the additional 9523.68 tons would have been 73 cents per ton, and the aggregate cost of mining the additional 9523.68 tons would have been $6952.28. If the jury believe the testimony as to this additional cost, and there is nothing to contradict it, it is mathematically demonstrable that the cost of mining the 120,415.68 tons would have been $1.19 per ton, and this figure should be accepted by the jury in arriving at the plaintiffs' damages.

12. The Commission found, and this finding is not contradicted, and should be consequently accepted by the jury, that the plaintiffs would have realized an average price of $1.598 per ton for the 9523.68 additional tons, and if the jury find that the plaintiffs' average cost of producing the same would have been $1.19 per ton, the difference between these two amounts, viz., 40.8 cents, represents the profit per ton which the plaintiffs failed to realize in the period of the action because of the non-receipt of cars for the shipment of the 9523.68 additional tons.

13. If the jury find that $1.19 would have been the average cost of producing the coal if 9523.68 additional tons had been mined, then the plaintiffs' damages, due to the enhanced cost of mining the 110,892 tons actually mined due to the curtailment of the output, are to be measured by the difference between the cost as found by the Commission, viz., $1.23 per ton, and the cost which the plaintiffs would have incurred, viz., $1.19, or 4 cents per ton.

14. The plaintiffs in this action can recover only

profits lost on so much of the 9523.68 tons as would have been shipped to points outside the State of Pennsylvania. The Commission has found that the shipments to points outside the State would have been 3878 tons. In ascertaining, therefore, the damages for which recovery can be had in the present action, they must be confined to the profits on 3878 tons, which, at 40.8 cents per ton, amount to $1582.22.

15. The damages recoverable in the present action because of the increased cost of mining the coal actually mined must also be confined to that coal which was shipped to points outside the State of Pennsylvania. This amounted to 45,163 tons, and if the jury should find that the average cost of producing the larger output which the Commission found the plaintiffs should have received cars for was $1.19, the damages recoverable on account of this increased cost would amount to $2258.15, being 4 cents a ton on 45,163 tons.

16. The plaintiffs are not entitled to recover interest on the amount of the award from June 28th, 1907, to the date on which the award was made.

17. The plaintiffs are not entitled to recover interest on the amount of the award from the date on which the award was made.

18. Under the law and the evidence the plaintiffs are not entitled to recover and your verdict should be for the defendant.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 2424. December Term, 1912.

JAMES H. MINDS and JULIA A. MATZ, trading as BULAH COAL COMPANY,

vs.

PENNSYLVANIA RAILROAD COMPANY.

DEFENDANT'S POINTS.

1. The burden is upon the plaintiffs to establish that in the period of the action they did not receive the cars to which they were justly entitled and the amount of the injury thereby sustained.

2. The findings of fact of the Interstate Commerce Commission which have been put in evidence are not binding or conclusive. If the testimony in the case has shown that they were incorrect or erroneous, they should not be accepted by the jury.

3. The Interstate Commerce Commission ascertained the number of cars which the plaintiffs, in the judgment of the Commission, should have received in the period of the action with reference to a rule of distribution promulgated by the Commission after the close of the period of the action. The Commission had no power to make its rule of distribution retroactive, and hence its conclusion or finding as to the number of cars that the plaintiffs should have received, and its award of damages based thereon are invalid and afford no basis for a recovery in the present case.

4. In determining the number of cars to which the plaintiffs were entitled the Interstate Commerce Commission was not at liberty to disregard the rule of distribution which it had itself promulgated, but was required to ascertain such number in accordance with this rule.

5. Under the rule of distribution prescribed by the Interstate Commerce Commission the plaintiffs were not entitled in the period of the action to any individual cars belonging to other shippers or to any fuel cars either of the defendant or of any other railroad company if these were consigned to other mines. The plaintiffs were entitled to their own individual cars and to their just and proper share of the cars which the defendant had available for distribution among shippers.

6. If the testimony has satisfied the jury that the Interstate Commerce Commission in arriving at the number of cars which the plaintiffs should have received ascertained this number by treating as justly allotable to them to percentage which their mine rating entitled them to of the aggregate of all the cars which were placed by the defendant at the mines in the region in which the plaintiffs' mine was located, regardless of the consideration that there were included in this aggregate a large number of individual cars belonging to other shippers, and fuel cars of the defendant and of other railroad companies, which had been placed at other mines, the method adopted by the Commission for ascertaining the number of cars which the plaintiffs should have received was not in accordance with its own rule and was consequently erroneous, and the finding or conclusion of the Commission as to the number which the plaintiffs should have received was therefore invalid and affords no basis for a recovery in the present action.

7. It appears from the evidence that in arriving at the number of additional cars which, in its judgment, the plaintiffs should have received the Interstate Commerce Commission failed to give effect in certain periods to the rule of the defendant in force at the time and approved by the Commission by which cars placed at mines were counted as part of the mine's quota on each day on which they were available for shipments. This rule was a lawful and proper one and the Commission was not justified in ignoring or disregarding it.

8. The defendant has submitted a statement prepared by a public accountant, purporting to show the number of cars which the plaintiffs would have received if distribution had been made by the defendant in accordance with the rule of the Interstate Commerce Commission. It appears from this statement that the additional cars to which they would have been entitled would not have exceeded 739 cars. Treating each car as having a capacity of thirty-five tons, the tonnage which could have been transported in these cars would have been 25,865 tons, and this tonnage should be accepted by the jury as representing that which the plaintiffs should have received cars for the shipment of, if the jury believe that the statement prepared by the accountant correctly shows the number of cars which under the Commission's rule of distribution plaintiffs were entitled to receive in addition to those which were actually delivered to them.

9. The burden is upon the plaintiffs to establish all facts necessary to a recovery, and one of these facts is the loss, if any, sustained by them as the result of the failure of the defendant to deliver the additional cars which the Commission has found should have been delivered to them.

10. The Commission found that it cost the plaintiffs, on an average, $1.08 per ton to mine and ship the

coal produced and shipped by them in the period of the action, and that if an additional 71,257 tons had been mined and shipped, this average cost would have been reduced to 88 cents per ton. The correctness of this finding is disputed, and it is for the jury consequently to determine whether the finding is correct or incorrect.

11. The evidence adduced upon behalf of the defendant has shown that if the plaintiffs had mined any additional tons in the period of the action they would have been obliged to pay or expend for each ton the miners' wages, which would have been 63 cents a ton, and the royalty on the coal mined, which would have been not less than ten cents a ton, and that if they had mined 71,257 tons, there would have been additional expenses of 7 cents per ton on account of ventilation and supplies, and 6 cents per ton on account of transportation, making a total additional expense of 86 cents per ton. If the jury believe this testimony as to this additional cost, the cost per ton of the coal mined, including these 71,257 additional tons, would have been $1.00.

12. The evidence has shown that if the plaintiffs had mined any additional tons in the period of the action they would have been obliged to pay or expend for each ton the miners' wages, which would have been 63 cents a ton, and the royalty on the coal mined, which would have been not less than 10 cents a ton. The additional cost that the plaintiffs would have been subjected to, therefore, had they mined any additional tonnage, would have been not less than 73 cents per ton. If the jury believe this testimony as to this additional cost, and there is nothing to contradict it, the cost per ton if 25,865 tons had been mined would have been $1.026.

13. The Commission found, and this finding is not

contradicted and should be consequently accepted by the jury, that the plaintiffs would have realized an average price of $1.132 per ton for any additional tonnage mined and shipped by them. The difference between this sum and the average cost of producing the coal to which the plaintiffs would have been subjected, represented the profit per ton which the plaintiffs would have realized on any additional coal which they would have mined and shipped.

14. The plaintiffs in this action can recover only profits not realized on so much of the additional tonnage which they should have received cars for, as would have been shipped to points outside the State of Pennsylvania. The Commission has found that 48,540 tons of the 71,257 tons for which it found cars should have been delivered to the plaintiffs, would have been shipped to points outside the State. If the jury, therefore, find that the plaintiffs should have received cars for the shipment of 71,257 additional tons, the recovery in the present action must be limited to the profits on 48,340. If the jury should find that cars for a less amount than 71,257 tons should have been received, then they would be justified in finding that the same proportion of this additional tonnage would have been shipped by the plaintiffs to points outside the State of Pennsylvania, as the Commission has found the plaintiffs would have shipped of the 71,257 tons already referred to.

15. The damages recoverable in the present case because of the increased cost of mining the coal actually mined must also be confined to that coal which was shipped to points outside the State of Pennsylvania. This amounted to 97,417 tons.

16. The plaintiffs are not entitled to recover interest on the amount of the award from June 28th, 1907, to the date on which the award was made.

17. The plaintiffs are not entitled to recover interest on the amount of the award from the date on which the award was made.

18. Under the law and the evidence the plaintiffs are not entitled to recover and your verdict should be for the defendant.

The jury retired.

Counsel for the plaintiff and defendant agree that the clerk of the Court may take the verdict of the jury should they reach a verdict in the absence of the Court.

It is stipulated by and between counsel for the plaintiff and defendant that the testimony and charge of the Court in this case when transcribed shall be filed with the record of this case as the official transcript.

The jury having retired, counsel for the plaintiff moved the Court for compensation or attorney's fees, as allowed under the act.

Court adjourned.

Philadelphia, Thursday, October 11, 1916, 10 A. M.

Present: Parties as before noted.

The jury rendered a verdict in favor of the plaintiff as to the case of James H. Minds, etc., versus Penn-

sylvania Railroad Company, No. 2422, December Term, 1912, for $16,092.92, and as to the case of James H. Minds, et al., etc., versus Pennsylvania Railroad, No. 2424, December Term, 1912, for $33,618.37.

And thereupon, the counsel for the said defendant did then and there except to the aforesaid charge and opinion of the said Court, and inasmuch as the said charge and opinion, so excepted to, do not appear upon the Record:

The said counsel for the said defendant did then and there tender this Bill of Exceptions to the opinion of the said Court, and requested the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid Judge at the request of the said counsel for the defendant, did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such case made and provided, this 8th day of November, 1916.

O. B. Dickinson, *J.* (Seal)

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

December Session, 1912. No. 2422.

Action under I. C. C. Statutes.

JAMES H. MINDS, et al.,
vs.
PENNSYLVANIA RAILROAD COMPANY.

December Session, 1912. No. 2424.

Action under I. C. C. Statutes.

BULAH COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

OPINION.
Filed Nov. 6, 1916.

SUR RULE IN ARREST OF JUDGMENT AND FOR A NEW TRIAL.

DICKINSON, *J.*

These cases were, by agreement, submitted to the one jury and tried together. They arise out of the Interstate Commerce laws and the Elkins Act. The controlling principles of law involved may be thus formulated. After an order has been made by the Interstate Commerce Commission in favor of a complainant shipper against a railroad carrier for the payment of a damage award, proceedings brought in court because of the refusal of the carrier to comply with the order are properly for the damages sustained by the com-

plainant (limited to the amount set forth in the pleadings) and such proceedings are *de novo* and the damages are to be found by the jury under all the evidence, including the findings of the Commission which are made evidence by the Acts of Congress. The right of action given by the Interstate Commerce laws to a partnership to recover damages suffered by it through the discriminatory acts and unfair practices of a railroad carrier is not lost in whole or part by the death of one of the partners. The common-law rule that personal actions die with the person has no application. The jury, in assessing damages, may consider as an element the lapse of time between the incurring of the damage and the rendering of the verdict and allow for this in the assessment. Such element of damage, however, could not exceed the equivalent in amount of lawful interest. These principles are in consonance with and can be deduced from the rulings in a number of cases of which it is sufficient to refer to:

Texas Rwy. Co. v. Abilene Co., 204 U. S., p. 442,
I. C. C. v. Alabama Rwy. Co., 168 U. S., 174.
Western N. Y. v. Penn Co., 137 Fed., 343,
P. R. R. v. Clark, 238 U. S., 456.

We can get a sufficiently clear view of the instant cases to which these broad principles are to be applied through an outline statement of the main facts followed by a more particular statement of the special points now made.

The plaintiffs are mine owners or operators. The defendant is a railroad carrier within the meaning of the law regulating interstate commerce. The plaintiffs deemed themselves the victims of discriminatory rules and practices of the defendant in its car distribution. A complaint was made to the Commission. This coupled a request for administrative rulings with a demand for an award of damages. The Commission condemned the

regulations of the defendant and formulated the just rule of car distribution, convicted the defendant of discrimination and found the plaintiffs to have been damaged, and the amount of the damage. An order was accordingly made in favor of the plaintiffs. This order was not complied with by the defendant and it was followed by the bringing of these actions. The basic question, the answer to which supplies answers to most of the questions now involved in the cases, is presented in these queries: What is the plaintiffs' right of action? Is it an action for damages or is it limited to an enforcement of the order of the Commission so far as in favor of the plaintiffs? Important obvious consequences flow from the answer to this question. The answer must be sought in the Acts of Congress. The genesis of these laws will afford us some light. The evils which it was the purpose of the law to suppress are too glaring to call for statement. They arose out of the acts and practices of the carriers. The law condemns them as unlawful, imposes a penalty and gives (which is the feature with which we are now concerned) a right of action to any person injured. Many, if not the main, features of such a law must be administrative and remedial. In consequence the carriers were required to file schedules of the rates and regulations adopted; a Commission was constituted to determine the fairness of such rates and regulations; to annul them if unjust or discriminatory and formulate just regulations in their stead and modes of redress to the injured party were provided. It is to be observed that the carriers in the first instance may file and, indeed, are required to file schedules and regulations approved only by themselves. The responsibility, however, is imposed upon them to see to it that the regulations comply with the law. If they do, although loss results, there is no injury in the legal sense. If they do not the resulting damage becomes a legal injury for which a right of action is given. The remedies provided are

these: Any form of action, otherwise open to the injured party, is preserved to him. He is given the right to resort to an action at law or he may, at his option, ask the Commission to award him damages. If he brings his action at law it is necessarily based upon two propositions. One is that the regulation of which he complains is unlawful and the rule which he seeks to have established is the proper one. Whether this be a conclusion of law or a finding of fact is an academic distinction, but it must in fact appear. The other is the fact and amount of his damage. The first is an administrative question and for obvious reasons is committed to the Commission and to the Commission alone to find. The second is a juridical question which may be submitted to the courts or to any tribunal having the lawful power to determine it. The consequence follows that recourse to the Commission is only in part optional. The administrative questions must be first determined by the Commission because if an action were brought at law, without this first finding, the plaintiff could not make out his case. His real option is this. He may submit the administrative question alone to the Commission and thus having established his right to recover his damages may bring his action at law and prove both his injury and the amount of his damages or he may exercise the right given him by the statute by submitting both questions to the Commission. If he takes the first course, the action is one for damages and subject to well known rules. If he takes the second course (as these plaintiffs did) what results? Had the right of trial by jury not been involved Congress would doubtless have given the award of the Commission the effect of a judgment. The complainant, being a volunteer, is concluded by what the Commission does. The defendant is not concluded. If the defendant complies with the order the plaintiff is done. If the order is not complied with the plaintiff may have recourse to the courts (Federal or State), setting forth his in-

jury, the fact of his complaint to the Commission and the order made thereon and that it has not been complied with. In the words of the Statute, the cause then proceeds as an action for damages except that the findings of the Commission are made evidence, and the defendant must pay costs and counsel fees. If this language of the Statute is taken at its face value and the action regarded as one for damages, the whole proceeding is simplified. If the view now presented by the defendant is taken, a host of baffling queries rush upon the mind. The obstacles which shut out this view may be summed up in the observation that if such be the law the defendant is given the undeserved advantage of being in a position in which it may gain, but cannot lose, and all it risks in this speculation are costs and counsel fees. In this view the jury would be required to find under all the evidence (including the order), not the damages (up to the limit of the award), but how much of the damage found by the Commission is shown by the evidence of the defendant at the trial to have been improperly allowed. Without meaning it as a statement of defendant's position, the practical effect may be presented by this illustration. If the Commission found a loss in tonnage of 1000 tons and a money loss of $2.00 per ton, and a consequent damage of $2,000.00, the plaintiff would be bound by each of these findings, but the defendant would not. If the defendant showed at the trial that the money loss per ton was only $1.00, the jury must apply this to the 1000 tons found by the Commission and could not render a verdict for over $1,000.00, notwithstanding that it also further appeared at the trial that the Commission had made another mistake and that the true tonnage was 2000 tons and the actual damage $2,000.00. In other words, any mistakes made by the Commission against the defendant must be corrected by the jury, but mistakes made against the plaintiff cannot be corrected notwithstanding the fact that one may offset the other. This is inconsistent with the rulings in the cited cases and under them we do not feel at liberty to consider the question

an open one. The action is one for damages, the proceedings in which are *de novo* and in the nature of an appeal with the added consequences engrafted upon it by the Act of Congress. Whether the jury could award a larger sum in damages than the Commission allowed does not arise here. It might be conceded that under the Act of Congress the plaintiff was so limited without affecting the character of the action as one for damages. This disposes of practically all of the questions raised. A formal disposition is made of all of them in the order in which they are set forth in the reasons for a new trial.

(1) We do not think the verdict excessive. There was a substantial reduction from the sum awarded by the Commission. This, under the Act of Congress, would have been a supporting basis for a larger verdict. As the order is evidence it cannot be said the verdict has no support in the evidence.

(2-6) The proposition advanced in the points upon which are based reasons 2, 3, 4, 5, and 6, is that a partnership, which suffers injury, loses its right to recover (in whole or in part) if one of the partners dies. We think this proposition was properly negatived. The minor point made as to the interregnum from April to October was in effect waived and because of this, not answered. Under the facts of the case there was no justification for insistence upon it. To have submitted it to the jury would have merely been confusing. To obviate the necessity of instructions the trial Judge inquired of counsel whether there was any dispute over the dates as of which the damages were to be assessed. The reply was there was none. The main point was ruled against the defendant. It was invited, if not satisfied with the general answer, to ask for a specific answer to any point submitted. No answer was requested to this point. This waived the minor point and we do not recognize the right of defendant to now complain.

(7-13) The points referred to in reasons 7 to 13,

both inclusive, were answered in the general charge. Specific answers were waived by defendant. The point now made we understand to be that the charge was erroneous. Whether it was or not is determined by the correctness of the theory on which the case was submitted to the jury. The points submitted were affirmed except in so far as they required the jury to find not what the damage was (up to the limit of the award of the Commission) under all the evidence (including the award), but what the damage was under the findings of the Commission as corrected by the evidence submitted by the defendant. This has been sufficiently discussed. The points could not be affirmed categorically because they ignore the provision of the Act of Congress which makes the findings of the Commission (including the amount of the damages) evidence. They are as much evidence as are the items of which the damage is made up.

(13 and 14) Points 16 and 17 here referred to were affirmed.

(15) This point asked for binding instructions to the jury to find for the defendant. The point was negatived and we still think properly so.

(16) The 18th point was based upon nothing in the case and the Court was not asked to answer it. If it is meant to invoke the rule which pertains in Pennsylvania of the consequences of delay in payment due to an unconscionable demand the attention of the Court should have been directed to this feature. In these cases no such question was raised.

The remaining sixteen reasons are really duplications of those discussed (being stated separately in each case) except the sixteenth. This complaint has a real basis. We would not, however, feel justified in subjecting the parties to the delay and expense of a new trial because of the inadequacy of the charge in this feature. The reason is this: The testimony referred to was that of an intelligent and fair witness with a firm grasp of the facts to which he testified.

These were all book-keeping or mathematical facts as he had no knowledge except that derived from the figures submitted to him. The trial Judge had in mind the definite purpose to advert to this testimony and its application to the case, but he was diverted from this purpose and it was forgotten. Counsel for defendant were in no way responsible for this lapse and their client should not suffer for it. Nevertheless the fact is they did not call attention to the oversight. Neither was it the fault of the plaintiffs and they are in no default and the loss should not fall on them.

The rule for a New Trial is discharged and plaintiff may enter judgment in each case on the verdict.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

December Session, 1912. No. 2422.

Action under I. C. C. Statutes.

JAMES H. MINDS, et al.,
vs.
PENNSYLVANIA RAILROAD COMPANY.

December Session 1912. No. 2424.

Action under I. C. C. Statutes.

BULAH COAL COMPANY
vs.
PENNSYLVANIA RAILROAD COMPANY.

SUPPLEMENTAL OPINION.
Filed Nov. 8, 1916.

DICKINSON, *J.*

We have recalled the opinion in this case for the purpose of clarifying the statements made in the dis-

cussion of reasons 7 to 13 and reason 16. The charge was open to the averment of error in two respects. One was the answer to the points. The points presented the thought that as one of the findings of the Commission was as to the tonnage, and this finding had been answered by the testimony of the accountant witness, the jury were bound to accept the evidence for the defendant because the plaintiff was concluded by the finding, and further because the correcting evidence was all one way. The court refused to so rule and instructed them that neither side was concluded by any of the special findings of the Commission, and they were to determine the questions of fact from all the evidence before them, part of which was the finding of the Commission as to the amount of the damage.

The other error was the inadequacy of the charge in the respect that it presented to the jury the evidence of the amount finding of the Commission, but their attention was not called to the testimony of the witness for the defendant. In saying that the defendant had waived specific answers to the points referred to, we meant merely that the charge of the court was intended and accepted as an answer to these points, affirming them so far as the charge was in accord with them, and dis-affirming them otherwise. We did not mean to imply that counsel had abandoned in any degree the contention of the defendant.

With respect to the inadequacy of charge feature, all that is intended is that the failure of the trial judge to specifically call the attention of the jury to the testimony of the witness referred to was, as it has been stated to have been, an oversight. Had the attention of the trial judge been called to this, he would have supplied the omission. It was not meant to be said that counsel for defendant did not intend to call attention to this feature. All that is meant is that the trial judge did not so understand it. Intending to have discussed this feature, the trial judge, at the close of the charge,

thought he had discussed it, and it was not until after the charge had been transcribed that he discovered the omission. It was doubtless because of this that the request of counsel was not understood to refer to this omission in the charge.

MOTION FOR JUDGMENT UPON THE VERDICT.
Filed Nov. 10, 1916.

AND NOW, to wit: this Tenth day of November, 1916, it is moved that judgment upon the verdict in the above case be entered in favor of the plaintiff and against the defendant.

H. W. Moore,
John H. Minds,
Attorneys for Plaintiff.

JUDGMENT.
Filed Nov. 10, 1916.

Before Dickinson, *J.*

And now, to wit, this 10th day of November, 1916, in accordance with praecipe filed, judgment is hereby entered on the verdict in the above entitled case in favor of the plaintiff and against the defendant in the sum of Sixteen thousand ninety-two and 92-100 ($16,092.92) Dollars.

BY THE COURT,
Attest:
Leo A. Lilly,
Deputy Clerk.

OPINION.
Filed Nov. 10, 1916.

SUR MOTION FOR ALLOWANCE OF ATTORNEY'S FEE.

DICKINSON, *J.*

In the application made to the Court to fix the amount of the fee allowance under the provisions of the Interstate Commerce law applicable to this proceeding, the statement was made, with the concurrence of all the counsel, that the allowed fees were part of the damages and to be incorporated into the judgment rendered.

The provision of Section 16 of the Act of Congress as amended was at the time in the mind of the Court but a copy of the Act was not then in hand for verification of this recollection. That provision is "if the petitioner shall prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit". This is the only pertinent provision we have been able to find. If the allowance of counsel fees has no other basis than this Section, then, as observed at bar, we see no need to fix the amount at this time. If counsel concur in this view, the application and the present finding may be withdrawn. We have no objections, however, to determining the question now, if it is desired that this be now done. Counsel have joined in asking this, and further for the filing of a memorandum expressing the views of the Court and the principles guiding it in making the allowance.

It has been ruled that the Act provides only for counsel fees in the proceeding at law, and that no allowance can be made for services rendered before the Interstate Commerce Commission. We have, therefore, restricted the allowance by excluding all proceedings before those begun in this Court.

In considering, however, the question of counsel fees and their reasonableness and the time of counsel necessarily consumed, we do not, because we cannot,

shut our eyes to the fact which is in this record that this case was the subject of investigation before the Commission. This fact we think does enter among the considerations involved in the question of reasonable fees. It is not that they should be allowed now for these past services because this should not be done and is not done. The analogue which suggests itself is presented by two supposititious cases. They have in common the necessity for the employment of counsel. They have further in common that a reasonable charge would be governed by the skill, the labor, the time, the responsibility, and as an element also the fruits of the litigation. In one case the petitioner might employ the services of counsel who had nothing whatever to do with the investigation by the Commission nor with the litigation before it. Because of their lack of information they would be required to inform themselves of all the fact features in order that they might properly prepare the case for trial. An inquiry into what had already been done before the Commission and access to the fruits of the labors of counsel then engaged would appreciably decrease the labor which otherwise would have been required of them, and would thus call for a less fee for services than if they had been under the necessity of making an original investigation into all the facts bearing upon the case and had not had the aid of the labors of their predecessors in the field. The allowance of counsel fees would in consequence have been fixed with the fact of such previous litigation in mind, but the allowance would have included the services of counsel in the necessary preparation of the case for trial. The same petitioner might secure as his counsel, for the purposes of the present proceeding, the same counsel who had been engaged in the hearings before the Commission. It might be and doubtless would be, at least to some extent, true that the labors of such counsel and the actual time devoted to the case by them would be less than what would have been had they not previously been connected with the case, but

there would have been, because of their familiarity with all features of the case, a probable increase of skill in its conduct, and skill enters as an element in the compensation as well as time. We, therefore, cannot see the soundness of the proposition that counsel in the latter case would not be entitled to at least as much compensation as in the first case, and, on the other hand, we can understand that because of their familiarity with all phases of the litigation and because their previous experience had peculiarly equipped them to deal with the questions involved that their services would command a higher compensation. Compensation for professional services is of necessity most difficult of admeasurement. Perhaps as fair a method or rule of charge as could be adopted by counsel would be to charge in the nature of per diem allowance for all the time of counsel really called for to be devoted to the case, and to charge a like, fair and reasonable percentage of the amount recovered as meeting the due of the skill and responsibility called for.

Having all these considerations in mind, we, in the language of the Act, allow to the plaintiffs the sum of Three Thousand Two Hundred and Fifty Dollars ($3250.00) as a reasonable attorney's fee, and hereby tax as part of the costs of the suit, and to be collected as such, an attorney's fee at that sum.

An exception is allowed to defendant.

BY THE COURT,

DICKINSON, *J.*

PETITION FOR WRIT OF ERROR.
Filed Nov. 14, 1916.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

And now, November 14, 1916, comes The Pennsylvania Railroad Company, defendant herein, and says

that on or about the 10th day of November, 1916, the said court entered judgment in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignments of error filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Third Circuit for the correction of errors so complained of, and that the transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

HENRY WOLF BIKLE,
FRANCIS I. GOWEN,
Attorneys for Defendant.
H. W. S.

ORDER ALLOWING WRIT OF ERROR.
Filed Nov. 14, 1916.

Before DICKINSON, *J.*

And now, November 14th, 1916, upon motion of Henry Wolf Bikle and Francis I. Gowen, attorneys for the defendant, and upon filing a Petition for a Writ of Error and Assignment of Errors, it is ordered that a Writ of Error be, and it is hereby, allowed to have reviewed in the United States Circuit Court of Appeals for the Third Circuit, the judgment heretofore entered herein, and the amount of bond on said Writ of Error be, and is hereby, fixed in the sum of $32,185.84.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

ASSIGNMENTS OF ERROR.
Filed Nov. 14, 1916.

And now, The Pennsylvania Railroad Company, defendant in this cause, files with its petition for a writ of error, the following assignments of error, upon which it will rely upon its appeal from the judgment in this court entered in this cause, and which appear in the record and proceedings in this cause.

I.

The learned trial Judge erred in entering the order made by him on the tenth day of April, 1916, granting leave to the plaintiff to amend the original petition filed in this case, the effect of the amendment thus allowed being to enable the plaintiff to assert a cause of action based upon an order of the Interstate Commerce Commission other than the order on which suit had originally been brought, which substituted order had been made by the Interstate Commerce Commission more than a year prior to the date of the allowance of the amendment.

II.

The learned trial Judge erred in charging the jury as follows:

> "Now, gentlemen, there is another question in this case, and that is this: There is a dispute as to the tonnage between these parties to this extent, and that bears also upon this question of cost, and the defendant presents to you this view of it: They figure up—and I will only give you the round figures instead of going into the actual figures, because they are somewhat confusing, but it will give you the idea—the defendant presents this view of it, that the actual total cost of the tonnage which was put out amounted in round figures to $136,000. If the increased tonnage could have been put out

at 88 cents, then the total cost instead of being $136,000 would have been only $105,000. The defendant, therefore, presents that view to you.

"Let me see if I can make it clearer by a simpler illustration, and taking small figures, because these large figures are a little confusing. Suppose a man is manufacturing or producing anything, and his total cost for producing it is $123. Now, you inquire how many units of product he has put out, how many anything, no matter what it is, and you find out he has put one hundred. Now, $123 that it has cost him, divided by one hundred, would give $1.23 per unit, when it has cost him $123 in the aggregate. Now, suppose you increase his units to one hundred and twenty, and you find that according to his calculation that his aggregate cost instead of increasing, as you would naturally expect it to do, in accordance with the increased output, or if it did not increase it would be difficult to understand how it would decrease—and you find that his aggregate cost instead of being $123 has been cut down to $105. You say, 'How can that be? I can easily understand that if a man spends $123 to put out one hundred things his unit cost is $1.23 for each one. That is clear enough. If he only puts out fifty then his cost for each one is double that. If he puts out two hundred at the same cost, then his cost per unit is half of the $1.23. That is clear enough. But if it costs a man $123 to put out one hundred, how can he possibly put out one hundred and twenty for $105?' Your conclusions would be that there was something wrong in the calculation of unit cost. You must have it too low. That is the question for you to determine in this case, because it bears upon both the aggregates of this claim and bears upon the unit cost, and therefore we have the testimony which has been adduced before you to show that

there is an inaccuracy in the claim presented by the plaintiff in that respect. Of course, gentlemen, while as a mathematical proposition that is obviously true, and that mathematically speaking it would be absurd for a man to say that he could produce one hundred things for $123 but if he increased his output to one hundred and twenty, produced twenty more of the same things in the same way, he would cut down his aggregate cost from $123 to $105. But you are to consider the argument addressed to you by counsel upon the other side, and their explanation of that phenomenon. I do not pretend to present all of it to you, but just enough to give you an illustration. Take a man who is shipping coal, for instance, and all his cars come to him in a regular way at the times at which he may employ his men right at once in filling them, getting them out of the way, bringing empties in and filling them and getting them out of the way, the result would be that he could get them out at a unit cost of a certain amount per ton, but if he had the men there and their wages going on and all the other expenses going on, and they were standing there idle doing nothing for an hour or two hours or three hours, or there were breaks and interruptions in the continuity of his work in the one case, then it would be easily understood that under one condition of work it might cost the man $123 to get out one hundred tons, and under the other more favorable conditions of work he might be able to get out one hundred and twenty tons at an aggregate cost of $105."

111.

The learned trial Judge erred in charging the jury as follows:

"In other words, you find the damages as you think they were on June 28th, 1907, and then you

add to it such sum as in your judgment will make the money received now the equivalent of that received on June 28th, 1907. That must not exceed six per cent. interest."

IV.

The learned trial Judge erred in refusing to affirm the first point submitted by the defendant, as follows:

"1. The present action is brought by the surviving and liquidating partner of a partnership to recover the amount of an award by the Interstate Commerce Commission in a proceeding instituted before that body after the dissolution of the partnership by the plaintiff as such surviving and liquidating partner to recover damages claimed to have been sustained by the partnership, due to alleged unjust discrimination prohibited by the Interstate Commerce Act, to which it had been subjected by the defendant. The cause of action asserted before the Commission did not survive the dissolution of the partnership, and consequently was not legally maintainable after such dissolution, and the plaintiff cannot consequently recover in the present action."

V.

The learned trial Judge erred in refusing to affirm the second point submitted by the defendant, as follows:

"2. In the proceeding brought before the Interstate Commerce Commission, the plaintiff in the present action was not entitled, as surviving or liquidating partner of the partnership formerly existing between himself and William J. Matz, to recover damages on account of any injury which may have been sustained by William J. Matz, as such partner because of the alleged unlawful dis-

crimination complained of in that proceeding, and the award, therefore, made by the Interstate Commerce Commission in favor of the plaintiff, as surviving and liquidating partner of the said partnership, was invalid, in so far as it directed payment to be made to the plaintiff of damages on account of injuries sustained by the said William J. Matz as such partner."

VI.

The learned trial Judge erred in refusing to affirm the third point submitted by the defendant, as follows:

"3. It appears that the partnership existing between James H. Minds and William J. Matz, trading as the Bulah Coal Company, was dissolved by the death on April 12th, 1904, of William J. Matz, and that subsequently, to wit, on October 5th, 1904, an agreement of partnership was entered into between the said James H. Minds and Julia A. Matz, which by its terms was to date from April 12th, 1904. Any cause of action, therefore, that James H. Minds could assert as surviving or liquidating partner of the partnership composed of himself and William J. Matz, to recover damages claimed in the proceeding before the Interstate Commerce Commission, was necessarily confined to the period antedating April 12th, 1904."

VII.

The learned trial Judge erred in refusing to affirm the fourth point submitted by the defendant, as follows:

"4. It appears that the award of the Interstate Commerce Commission which forms the basis of the present action covered a period extending beyond April 12th, 1904, and down to October 1st, 1904. The award, therefore, covers a period of time in which damages were not recoverable by the

complainant in the proceeding before the Interstate Commerce Commission, and the award, therefore, was invalid, and the amount thereof is not recoverable in the present action."

VIII.

The learned trial Judge erred in refusing to affirm the fifth point submitted by the defendant, as follows:

"5. There is no evidence which would justify the jury in determining how much of the award made by the Interstate Commerce Commission is properly referable to the period prior to April 12th, 1904, and in the absence of evidence on this point the jury cannot guess at the amount which is referable, and cannot, therefore, in the present action render a verdict for the plaintiffs for more than nominal damages."

IX.

The learned trial Judge erred in refusing to affirm the eleventh point submitted by the defendant, as follows:

"11. The evidence has shown that if the plaintiffs had mined 9523.68 additional tons they would have been obliged to pay for each ton the miners' wages, which would have been 62 cents a ton prior to April 1st, 1903, and 66 cents a ton thereafter, and a royalty of 10 cents a ton. Upon the basis of an average mining charge for the period of 63 cents a ton, the additional cost that the plaintiffs would have been subjected to had they mined the additional 9523.68 tons would have been 73 cents per ton, and the aggregate cost of mining the additional 9523.68 tons would have been $6952.28. If the jury believe the testimony as to this additional cost, and there is nothing to contradict it, it is mathematically demonstrable that the cost of min-

ing the 120,415.68 tons would have been $1.19 per ton, and this figure should be accepted by the jury in arriving at the plaintiff's damages."

X.

The learned trial Judge erred in refusing to affirm the twelfth point submitted by the defendant, as follows:

"12. The Commission found, and this finding is not contradicted, and should be consequently accepted by the jury, that the plaintiffs would have realized an average price of $1.598 per ton for the 9523.68 additional tons, and if the jury find that the plaintiffs' average cost of producing the same would have been $1.19 per ton, the difference between these two amounts, viz., 40.8 cents, represents the profit per ton which the plaintiffs failed to realize in the period of the action because of the non-receipt of the cars for the shipment of the 9523.68 additional tons."

XI.

The learned trial Judge erred in refusing to affirm the sixteenth point submitted by the defendant, as follows:

"16. The plaintiffs are not entitled to recover interest on the amount of the award from June 28th, 1907, to the date on which the award was made."

XII.

The learned trial Judge erred in refusing to affirm the seventeenth point submitted by the defendant, as follows:

"17. The plaintiffs are not entitled to recover interest on the amount of the award from the date on which the award was made."

XIII.

The learned trial Judge erred in refusing to affirm the eighteenth point submitted by the defendant, as follows:

"18. Under the law and the evidence, the plaintiffs are not entitled to recover and your verdict should be for the defendant."

XIV.

The learned trial Judge erred in entering judgment in favor of the plaintiff and against the defendant upon the verdict of the jury.

XV.

The learned trial Judge erred in allowing a counsel fee of $3250.00, since such counsel fee was excessive.

XVI.

The learned trial Judge erred in allowing a counsel fee of $3250.00, since such fee was made with reference to services of counsel before the Interstate Commerce Commission as well as in connection with the institution and prosecution of the present action in the District Court.

XVII.

The learned trial Judge erred in allowing a counsel fee of $3250.00, since such fee was not restricted to the services of counsel rendered in connection with the initiation and prosecution of the case in the District Court.

Henry Wolf Bikle,
Francis I. Gowen,
Attorneys for Defendant.
H. W. S.

PRAECIPE SUR TRANSCRIPT.
Filed Nov. 14, 1916.

To the Clerk of United States District Court, Eastern District of Pennsylvania:

In making up the transcript of record in the above entitled case you are to include the following:

Docket entries,
Writ of error,
Petition,
Demurrer to Petition,
Order overruling Demurrer,
Plea,
Petition to Amend Original Petition,
Answer sur Petition for leave to amend Petition,
Order of Court granting leave to amend original Petition,
Pleas to Amended Petition,
Bill of Exceptions,
Opinion Dickinison, J., sur motion for new trial,
Supplemental Opinion sur motion for new trial,
Motion for judgment,
Judgment,
Opinion sur counsel fees,
Petition for allowance of writ of error,
Assignments of error,
Clerk's certificate,

and no others.

HENRY WOLF BIKLE,
FRANCIS I. GOWEN,
Attorneys for Plaintiffs in Error.
H. W. S.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *Sct.*

I, William W. Craig, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify that the annexed and foregoing is a true and faithful copy of so much of the Pleas and Proceedings in the case of James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company vs. Pennsylvania Railroad Company, No. 2422, December Sessions, 1912, as per praecipe of counsel filed, a copy of which is hereto annexed the transcript of record is to include and now remaining among the records of the said court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia,
(Seal) this 21st day of November, in the year of our Lord one thousand, nine hundred and sixteen and in the one hundred and forty-first year of the Independence of the United States.

WILLIAM W. CRAIG,
Clerk District Court U. S.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2194 (List No. 16).

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES H. MINDS, Surviving and Liquidating Partner of James H. Minds and William J. Matz, Lately Trading as Bulah Coal Company, Defendant in Error.

And afterwards, to wit, on the 30th day of April, 1917, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Joseph Buffington, Hon. John B. McPherson and Hon. Victor B. Woolley, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 19th day of July, 1917, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2194.

PENNA. RAILROAD CO.

vs.

JAMES H. MINDS, Surviving Partner, &c., Lately Trading as Bulah Coal Co., Plaintiff Below.

March Term, 1917.

No. 2195.

PENNA. RAILROAD CO.

vs.

JAMES H. MINDS and JULIA A. MATZ, Trading as Bulah Coal Co., Plaintiffs Below.

Error to the District Court of the United States for the Eastern District of Pennsylvania.

Before Buffington, McPherson, and Woolley, Circuit Judges.

MCPHERSON, *Circuit Judge:*

In these cases the plaintiffs filed petitions in the district court to enforce orders of reparation made by the Interstate Commerce Com-

mission (23 I. C. C. 192); the orders being based on the Railroad's discrimination against the Bulah Coal Co. in the distribution of cars; 20 I. C. C. 52. Two periods are involved, one (No. 2194), from July 1, 1902, to October 1, 1904, and the second (No. 2195), from Oct. 1, 1904, to June 30, 1907. The cases were tried together, but separate verdicts and judgments were entered, in No. 2194 for $16,092.92, and in No. 2195 for $33,617.37.

During the first period James H. Minds and William J. Matz, a partnership known as the Bulah Coal Co., leased and operated a bituminous coal mine known as Webster No. 4, situated on the Tyrone Division of the Railroad's system in the Clearfield district of Pennsylvania. The mine had no other outlet to market. Matz died in April, 1904, and Minds continued the operation as surviving partner until October 1. On that date, a new partnership bearing the same name, composed of Minds and Julia A. Matz, the widow, executrix, and sole legatee of William J. Matz, took over the mine and went on with the business until June 30, 1907. During the 5 years in question, whenever the Railroad's available supply of cars was not large enough to carry the aggregate production of the district, the cars were allotted to the mines on a percentage basis, this percentage being determined in accordance with the Railroad's rule.

The Coal Co. objected to the rule as unfair and discriminatory, and in June 1907 attacked it before the Commission. Two proceedings were brought, the first by Minds as surviving partner, covering the first period: the claim was for about $80,000 damages, and in March 1912 a reparation order was entered for about $18,600 with interest from June 28, 1907. The second proceeding was by Minds and Julia Matz, trading as the Bulah Coal Co., and covered the second period; the claim was for about $75,000 damages and the order, also entered in March 1912, was for about $31,700, with interest from June 28, 1907. Neither award was paid, and on each a separate action was brought. By mistake the awards were confused, so that Minds as surviving partner sued on the order entered in favor of Minds and Julia Matz, while Minds and Julia Mtaz sued on the order entered in favor of Minds as surviving partner. This was an obvious blunder, and on April 10, 1916, the district court allowed the orders to be transposed, the Railroad objecting, then and now, on the ground that such an amendment could not be granted after one year from the date of the orders. As we understand, however, this position is not much relied on, and in any event we see no reason to say anything about it except to approve the action of the district court in setting right what was a plain and harmless mistake. Its correction did the Railroad no possible injury.

In passing on the Coal Co.'s complaints, the Commission decided that the Railroad's rule was wrong, and had resulted in discrimination; and then announced the correct rule, which showed that the Coal Co. had not received its proper quota. The Railroad contends that the Commission has not disclosed the basis on which the rule rests, but has merely stated in effect that the Coal Co. could, and would, have mined and shipped certain additional tonnage, if its

share of cars had been received. This contention is not correct, as a reading of the Commission's full reports on this subject will show; Ohio R. R. Com. v. Hocking Valley Ry., 12 I. C. C. 398; Traer v. Chic. & Alt. R. R., 13 I. C. C. 451; Hillsdale Co. vs. Pa. R. R., 19 I. C. C. 356; Minds vs. Pa. R. R., 20 I. C. C. 52.

The basis of the Commission's orders is certain findings of fact concerning the capacity at which the mine should be rated; the number of working days that should constitute an average working month; the number of additional tons that the Coal Co. could and would have mined, sold, and shipped, during the whole 5 years, if the mine had received its proper share of cars; the amount of profit that would have been made on the estimated additional tonnage; the actual cost of mining per ton; and the estimated cost if the mine had received its proper share of cars. In the district court, the Coal Co. offered the evidence of several witnesses in addition to the findings and orders. The Railroad did not, and does not, dispute the findings except in two particulars; (*a*) It denies that the Coal Co. could have mined coal at a cost of 88 cents per ton, even if the proper share of cars had been furnished; and (*b*) It disputes the estimate of additional tonnage that the Coal Co. would have mined and shipped during the second period, if such share had been received.

As to the first particular, the Railroad insists, that the Coal Co. could not possibly escape two items of cost, namely, the mine rate of wages and the royalty, and that, even if nothing else than these items were charged against the additional tonnage, the cost of mining both the coal that was actually brought to the surface, and the estimated additional coal, would necessarily have been more than 88 cents, the cost found by the Commission. And, in further reference to the cost of mining during the second period, the Railroad insists that the inevitable cost would have embraced two other items in addition to the mine rate of wages and the royalty. To the Railroad's evidence concerning this first particular, the Coal Co. offered some evidence in reply, and thereupon the Railroad asked for instructions whose refusal is assigned for error.

The other particular referred to relates to the second period only. The Railroad contends, that when the Commission estimated the additional tonnage that could and would have been mined and shipped if the Coal Co. had received its proper share of cars, they disregarded their own rule of distribution. This contention bears directly upon the present controversy, because the amount of the Coal Co.'s damage depends largely on the number of cars it should have received. It would have made profits if it had been able to ship, and it could have shipped if it had received the cars, so that the Railroad's failure to furnish the cars bears directly on the question of damage. The Railroad's argument is, that in substance the Commission's rule provides as follows; The capacity of each mine in the district is to be rated by adding the tons it could produce (its physical capacity), and the average number of tons it could sell (its commercial capacity), and dividing the sum by two—the capacity or rating thus ascertained being the basis on which cars are to be apportioned during percentage periods. The first step in

determining the number of cars to be allotted to each mine during such periods is to determine the proportion that would normally go to the mine. This is obtained by taking the aggregate ratings of all the mines in the district and fixing the proportion that each rating bears to the aggregate. The next step is to determine how many cars are available, and in so doing all the cars in the four classes described below are to be put into one pool. Whenever there are cars enough to carry all the coal produced, no question of diminishing the number for each mine arises; but during percentage periods the question does arise continually, for under the Commission's rule the three classes of "assigned" cars must first be allotted to the mines that have a prior right thereto, and this allotment inevitably compels a readjustment of the "unassigned" or "system" cars that each mine is to receive. There are 4 classes of coal cars; (1) individual or private cars, owned or leased by a shipper, (2) cars intended to carry fuel for the Penna. Railroad itself, (3) cars sent by foreign railroads intended to carry their own fuel supply, and (4) other cars furnished by the Railroad for general commercial use. The first three classes are "assigned" cars, and the cars in the fourth class are "unassigned" or "system" cars. The rule requires that the assigned cars shall first be given to such mines as may be designated either by the owners or lessees of the private cars, or by the respective railroads; and requires that these 3 classes shall be thus allotted in the first instance, without regarding the number of cars to which the particular mine might be entitled if its rating alone were considered—the result being,—that when the system cars come to be distributed, they cannot be properly allotted without first taking into account the previous allotment of the assigned cars. For example; if a mine has already received assigned cars, these must be counted against the share to which its rating (if taken alone) would entitle it, so that, if the assigned cars already received equal or exceed the mine's share estimated according to its rating alone, it receives none of the system cars; while on the other hand, if the assigned cars already received are fewer than its rating (if considered alone) would entitle it to receive, the mine does receive some of the system cars, but only so many as will bring the total number up to the rating. On this point, the Railroad contends, that the Commission undoubtedly disregarded its own rule in estimating the additional tonnage that would have been mined and shipped by the Coal Co. during the second period, and has ascertained such tonnage by a different and incorrect method.

The Railroad complains also about the damages recovered as interest by the plaintiffs, its position being this: Minds as surviving partner claimed about $80,000, and was awarded only about $18,600; Minds and Julia Matz claimed about $75,000, and were awarded only about $31,700; each sum to bear interest from June 28, 1907. The Railroad objects to the Commission's allowance of interest, and also to any allowance of interest in the district court, on the ground that the findings and orders of the Commission and the evidence offered at the trial show clearly that the plaintiff's demands were grossly and unfairly inflated.

Finally, after the trial, counsel fees were asked for and allowed; and these are now objected to as excessive, and also as without legal warrant, the second objection being put on the ground that the fees should have been confined to the services of counsel in connection with the suits in the district court.

(1) The Railroad complains, but we think without sufficient warrant, that the trial judge erred in what he said to the jury in submitting the question, how much the cost of mining would have been if the plaintiffs had received their proper share of cars. We think his instructions were sufficient, and see no occasion to discuss them. Moreover, on this subject the evidence was conflicting, and, since the credibility of opposing testimony was involved, the Railroad was not entitled to binding instructions. The verdict on this point must be accepted as final.

(2) The next matter concerns the second period only, and presents the objection on which the Railroad seems to lay most weight, namely, that in making the orders of reparation the Commission followed, not its own, but another, rule of distribution. In this respect the Railroad contends that the situation is very much like the situation in Railroad vs. Jacoby, 242 U. S. —, and indeed is controlled by that decision. In our opinion, an important difference exists for the following reasons:

Before the Commission the Jacoby case and the case now in hand were considered in the same group, and both cases attacked the Railroad's rule of distribution on the ground of discrimination. When the Jacoby case came to be tried in the district court, the plaintiff offered no other evidence than the Commission's order, whereupon the Railroad offered tables showing in detail that during the period then in question certain favored companies had received cars amounting to 59.9 and 59.6 per cent of their ratings. Jacoby had received a much smaller percentage, and the relevancy of the tables was, not so much to prove the discrimination as to show in connection with other evidence that the Commission had calculated Jacoby's damages by using precisely the same percentages, and had thus permitted recovery (as the Supreme Court said)—

"* * * not upon the basis of damages sustained by reason of the illegal discrimination practiced against the plaintiffs as found by the Commission, but upon the basis that (Jacoby was) entitled to receive cars equal in ratio to those illegally and preferentially given to the certain favored companies named in the tables. The effect of the enforcement of such rule, would be, not to give the shipper the damage which he actually suffered, but would base the recovery upon a rule which is condemned as to others, because of its discrimination in their favor,—a result manifestly not intended by the act of Congress."

In the district court Jacoby recovered the amount thus improperly awarded by the Commission, with interest thereon, and the Supreme Court held that such a result was wrong; and that the jury should have been instructed, that, if the Commission's award was in fact based on the proposition that Jacoby also was entitled to cars

amounting to 59.9 and 59.6 per cent, the award was erroneous and the plaintiff should not have recovered. The supreme court said:

"It is urged that the testimony before the Commission is not all in the record, and that for aught that appears the Commission may have reached its conclusion and awarded damages upon other and competent proofs, and it is insisted that the coincidence of the amount as awarded and the amount ascertained by the use of the percentages contained in the tables may not necessarily have controlled the action of the Commission. But it is difficult to reach the conclusion that the Commission could have arrived at the result so exactly corresponding with the one obtained by the use of the percentage, shown in the tables, except by actually using them to ascertain the sum which is exactly the amount resulting from their application. The Commission might have approximated the same result by using other and legal means to ascertain the damages sustained, but when it is demonstrated that the use of the percentages precisely produces the amount awarded to the dollar and cent, it seems almost mathematically certain that the result could have been reached in no other way. At least, we think that the testimony was in such shape that, as we have already said, the Company was entitled to the specific request upon this subject submitting the matter to the jury."

In some respects the case now in hand is like Jacoby's case, but it differs in what we regard as a material particular. Laying aside the fact that the present plaintiffs offered other evidence than the Commission's findings and orders, we think it important to observe that the principal of each verdict is for a sum considerably less than the principal of the Commission's award, so that the recovery here does not rest on the award alone, but is undoubtedly based on all the evidence touching the subject of the plaintiff's damage. As an award by the Commission is only prima facie evidence of the amount of damage, it follows that on the trial in the district court the Railroad may attack the amount, and if the evidence show that the award is incorrect the jury should follow the evidence and reject the award. We do not decide the question, whether a plaintiff can recover more than the Commission awards, but undoubtedly the Railroad may prove that the sum is too large. As the verdicts here demonstrate, the jury did not follow the orders of the Commission, and it seems to us, therefore, that, even if the awards be calculated on the wrong theory, the plaintiffs have not recovered on this theory, but on other evidence, and are not to be charged with the Commission's possible mistake. In the Jacoby case the jury repeated the Commission's mistake precisely, and in this respect the case before us appears to be materially different, for the jury here has rejected the Commission's calculation, and has reached a different result.

We have considered the Railroad's position at some length in order to present it to the Supreme Court if the case should be reviewed by that tribunal, but in our opinion the question is not before us on this record for the following reason: The district judge gave to the jury a clear and painstaking explanation of the questions submitted, and in general terms he instructed them about the proper method of distributing cars; but, no doubt by inadvertence (as he himself

has stated in 237 Fed. on page 272), he did not call their attention in detail to some of the evidence, particularly to a table or blue print that was regarded by the Railroad as of much importance. Some of the Railroad's requests for charge were based on this table, and indeed the argument of counsel in this court rested in large measure thereon. At the end of the charge the trial judge said:

"I think I have gone over the subject-matter of all of the different points submitted to me. So far as they are affirmed in the general charge they are affirmed, and so far as not affirmed in the general charge they are disaffirmed, and counsel if they choose may call my attention to any specific point which they would like to have specifically answered."

This was a plain request to counsel to call his attention to any omission, and in fairness to him should have been then complied with. But he was not asked to answer specifically any of the Railroad's points. On the contrary, counsel replied as follows:

"In the first period we do not dispute the lost tonnage nor the cost. In the second period we dispute the correctness both of plaintiff's cost figures and also the tonnage. We ask that the court so charge."

The court immediately complied with this request, whereupon each party sent out its own claculation of the amount due in order to save the jury from labor. As it seems to us, the Railroad should not now be allowed to complain, as it does complain by several assignments of error, that some of its requests for instruction were not given. The situation is dealt with so well in Thompson v. Lumber Co., 55 Pa. Super, 327, that we content ourselves by repeating what was said in that case by President Judge Rice:

"The charge as a whole was a clear, comprehensive, and impartial presentation of the issues of fact to be decided, and if there was omission to call attention to, or comment upon as fully as might be deemed desirable, specific facts or phases of the evidence, it was an inadvertency, which, if the judge's attention had been called to it, doubtless would have been corrected. The decisions are numerous, and are founded on just principles essential to the avoidance of undue expense and delay in the adjudication of cases, that inadvertent mistakes or omissions in reviewing the testimony should be called to the attention of the court before the case goes to the jury, so that the error, if there is one, may be corrected before it has done any harm. As to such inadvertent omission or mistake, it has been said, and we think the principle is applicable to these assignments, that "a party may not sit silent and take his chance of a verdict, and then if it is adverse complain of a matter which, if an error, would have been immediately rectified and made harmless:" Com. v. Razmus, 210 Pa. 609; Com. v. Minney, 213 Pa. 149; Medis v. Bentley, 216 Pa. 324; Slavin v. Northern Cambria Street Railway Co., 47 Pa., Superior Ct. 454; Com. v. Eaby, 52 Superior Ct. 619."

(3) With regard to the allowance of damages for delay in the form of interest, we find no error to correct. Altho such an allowance in actions of tort is not a matter of right, it is nevertheless permissible and often forms part of a verdict. On the facts of this case we cannot say that no allowance should have been made: the only ground of

the objection is the difference between the amount originally claimed before the Commission and the amount finally adjudged to be due, and this difference is not of itself sufficient to require us to decide as a matter of law that the plaintiff's original claims were unduly inflated or made in bad faith. Besides, if the subject should be within our power on this record, the amount of this allowance, whether by the commission or by the jury, does not seem to us excessive, and we see no reason on this account to interfere with the verdict.

(4) As to the award of counsel fees, we are similarly uncertain. We accept the statement of the trial judge that he confined himself to compensation for services in the district court, and, as we do not know what facts he had before him, we are unable to say that any abuse of discretion appears from the mere amount of his award.

In each case the judgment is affirmed.

Endorsed: No. 2194. Opinion of the Court by McPherson, J. Received and filed July 19, 1917. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2194 (List No. 16).

PENNA. RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES H. MINDS, etc., Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs.

(Signed) JOHN B. McPHERSON,
Circuit Judge.

Philadelphia, July 19, 1917.

Endorsed: No. 2194. Order Affirming Judgment. Received and filed July 19, 1917. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2194.

PENNSYLVANIA RAILROAD CO., Plaintiff in Error,

vs.

JAMES H. MINDS, etc., Defendant in Error.

And afterwards, to wit, on the seventeenth day of September, 1917, a petition for re-argument or modification of the Court's opinion was duly filed, whereupon the Court made the following order:

And now, to wit, October 8, 1917, after due consideration, the petition for re-argument or modification of the court's opinion in the above-entitled case is hereby refused.

(Signed) PER CURIAM.

Received and filed Oct. 8, 1917. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2194.

THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES H. MINDS, Surviving and Liquidating Partner of James H. Minds and William J. Matz, Lately Trading as Bulah Coal Company, Defendant in Error.

Specifications of Error.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

Now comes the plaintiff in error, The Pennsylvania Railroad Company, by Henry Wolf Bikle and Francis I. Gowen, its Attorneys, and says that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Third Circuit in the above entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error in this, to wit:

1. The said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania for sixteen thousand ninety-two Dollars and ninety-two cents ($16,092.92), and costs of suit, entered

on the 10th day of November, A. D. 1916, in favor of said defendant in error and against said plaintiff in error.

2. The said Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court for the Eastern District of Pennsylvania and in not remanding the said cause to the said District Court for a new trial.

3. The said Circuit Court of Appeals erred in not sustaining the first assignment of error in the said cause, which assignment was as follows:

"I. The learned trial Judge erred in entering the order made by him on the tenth day of April, 1916, granting leave to the plaintiff to amend the original petition filed in this case, the effect of the amendment thus allowed being to enable the plaintiff to assert a cause of action based upon an order of the Interstate Commerce Commission other than the order on which suit had originally been brought, which substituted order had been made by the Interstate Commerce Commission more than a year prior to the date of the allowance of the amendment."

4. The said Circuit Court of Appeals erred in not sustaining the second assignment of error in the said cause, which assignment was as follows:

II. The learned trial Judge erred in charging the jury as follows:—

"Now, gentlemen, there is another question in this case, and that is this: There is a dispute as to the tonnage between these parties to this extent, and that bears also upon this question of cost, and the defendant presents to you this view of it: They figure up—and I will only give you the round figures instead of going into the actual figures, because they are somewhat confusing, but it will give you the idea—the defendant presents this view of it, that the actual total cost of the tonnage which was put out amounted in round figures to $136,000. If the increased tonnage could have been put out at 88 cents, then the total cost instead of being $136,000 would have been only $105,000. The defendant, therefore, presents that view to you.

"Let me see if I can make it clearer by a simpler illustration, and taking small figures, because these large figures are a little confusing. Suppose a man is manufacturing or producing anything, and his total cost for producing it is $123. Now, you inquire how many units of product he has put out, how many anything, no matter what it is, and you find out he has put one hundred. Now, $123 that it has cost him, divided by one hundred, would give $1.23 per unit, when it has cost him $123 in the aggregate. Now, suppose you increase his units to one hundred and twenty, and you find that according to his calculation that his aggregate cost instead of increasing, as you would naturally expect it to do, in accordance with the increased output, or if it did not increase it would be difficult to understand how it would decrease—and you find that his aggregate cost instead of being $123 has been cut down to $105. You say, 'How can that be? I can easily understand that if a man spends $123 to put out one hundred things his unit cost is $1.23 for each one. That is clear enough. If he only puts out fifty then his cost for

each one is double that. If he puts out two hundred at the same cost, then his cost per unit is half of the $1.23. That is clear enough. But if it costs a man $123 to put out one hundred, how can he possibly put out one hundred and twenty for $105?' Your conclusions would be that there was something wrong in the calculation of unit cost. You must have it too low. That is the question for you to determine in this case, because it bears upon both the aggregate of this claim and bears upon the unit cost, and therefore we have the testimony which has been adduced before you to show that there is an inaccuracy in the claim presented by the plaintiff in that respect. Of course, gentlemen, while as a mathematical proposition that is obviously true, and that mathematically speaking it would be absurd for a man to say that he could produce one hundred things for $123 but if he increased his output to one hundred and twenty, produced twenty more of the same things in the same way, he would cut down his aggregate cost from $123 to $105. But you are to consider the argument addressed to you by counsel upon the other side, and their explanation of that phenomena. I do not pretend to present all of it to you, but just enough to give you an illustration. Take a man who is shipping coal, for instance, and all his cars come to him in a regular way at the times at which he may employ his men right at once in filling them, getting them out of the way, bringing empties in and filling them and getting them out of the way, the result would be that he could get them out at a unit cost of a certain amount per ton, but if he had the men there and their wages going on and all the other expenses going on, and they were standing there idle doing nothing for an hour or two hours or three hours, or there were breaks and interruptions in the continuity of his work in the one case, then it would be easily understood that under one condition of work it might cost the man $123 to get out one hundred tons, and under the other more favorable conditions of work he might be able to get out one hundred and twenty tons at an aggregate cost of $105."

5. The said Circuit Court of Appeals erred in not sustaining the third assignment of error in the said cause, which assignment was as follows:

III. The learned trial judge erred in charging the jury as follows:

"In other words, you find the damages as you think they were on June 28th, 1907, and then you add to it such sum as in your judgment will make the money received now the equivalent of that received on June 28th, 1907. That must not exceed six per cent interest."

6. The said Circuit Court of Appeals erred in not sustaining the ninth assignment of error in the said cause, which assignment was as follows:

IX. The learned trial Judge erred in refusing to affirm the eleventh point submitted by the defendant, as follows:

"11. The evidence has shown that if the plaintiffs had mined 9523.68 additional tons they would have been obliged to pay for each ton the miners' wages, which would have been 62 cents a ton prior

to April 1st, 1903, and 63 cents a ton thereafter, and a royalty of 10 cents a ton. Upon the basis of an average mining charge for the period of 63 cents a ton, the additional cost that the plaintiffs would have been subjected to had they mined the additional 9523.68 tons would have been 73 cents per ton, and the aggregate cost of mining the additional 9523.68 tons would have been $6,952.28. If the jury believe the testimony as to this additional cost, and there is nothing to contradict it, it is mathematically demonstrable that the cost of mining the 120,415.68 tons would have been $1.19 per ton, and this figure should be accepted by the jury in arriving at the plaintiff's damages."

7. The said Circuit Court of Appeals erred in not sustaining the tenth assignment of error in the said cause, which assignment was as follows:

X. The learned trial Judge erred in refusing to affirm the twelfth point submitted by the defendant, as follows:

"12. The Commission found, and this finding is not contradicted, and should be consequently accepted by the jury, that the plaintiffs would have realized an average price of $1.598 per ton for the 9523.68 additional tons, and if the jury find that the plaintiffs' average cost of producing the same would have been $1.19 per ton, the difference between these two amounts, viz., 40.8 cents, represents the profit per ton which the plaintiffs failed to realize in the period of the action because of the non-receipt of the cars for the shipment of the 9523.68 additional tons."

8. The said Circuit Court of Appeals erred in not sustaining the eleventh assignment of error in the said cause, which assignment was as follows:

XI. The learned trial Judge erred in refusing to affirm the sixteenth point submitted by the defendant, as follows:

"16. The plaintiffs are not entitled to recover interest on the amount of the award from June 28th, 1907, to the date on which the award was made."

9. The said Circuit Court of Appeals erred in not sustaining the twelfth assignment of error in the said cause, which assignment was as follows:

XII. The learned trial Judge erred in refusing to affirm the seventeenth point submitted by the defendant, as follows:

"17. The plaintiffs are not entitled to recover interest on the amount of the award from the date on which the award was made."

10. The said Circuit Court of Appeals erred in not sustaining the thirteenth assignment of error in the said cause, which assignment was as follows:

XIII. The learned trial judge erred in refusing to affirm the eighteenth point submitted by the defendant, as follows:

"18. Under the law and the evidence, the plaintiffs are not entitled to recover and your verdict should be for the defendant."

11. The said Circuit Court of Appeals erred in not sustaining the fourteenth assignment of error in the said cause, which assignment was as follows:

XIV. The learned trial Judge erred in entering judgment in favor

of the plaintiffs and against the defendant upon the verdict of the jury.

12. The said Circuit Court of Appeals erred in not sustaining the fifteenth assignment of error in the said cause, which assignment was as follows:

XV. The learned trial Judge erred in allowing a counsel fee of $3,250, since such counsel fee was excessive.

13. The said Circuit Court of Appeals erred in not sustaining the sixteenth assignment of error in the said cause, which assignment was as follows:

XVI. The learned trial judge erred in allowing a counsel fee of $3,250, since such fee was made with reference to services of counsel before the Interstate Commerce Commission as well as in connection with the institution and prosecution of the present action in the District Court.

14. The said Circuit Court of Appeals erred in not sustaining the seventeenth assignment of error in the said cause, which assignment was as follows:

XVII. The learned trial Judge erred in allowing a counsel fee of $3,250, since such fee was not restricted to the services of counsel rendered in connection with the initiation and prosecution of the case in the District Court.

Wherefore, the said, The Pennsylvania Railroad Company, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the plaintiff in error the said judgment of the said United States Circuit Court of Appeals be reversed, annulled, and for naught esteemed, and that said cause be remanded to the United States District Court for the Eastern District of Pennsylvania, with instructions to grant a new trial in said cause, or for such further proceedings in said cause as may be determined upon by the Supreme Court, to the end that justice may be done in the premises.

THE PENNSYLVANIA RAILROAD COMPANY,
By HENRY WOLF BIKLÉ,
FRANCIS I. GOWEN,
Attorneys for Plaintiff in Error.

October 11th, 1917.

Endorsed: No. 2194. Specifications of Error. Received and filed Oct. 12, 1917. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2194.

THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES H. MINDS, Surviving and Liquidating Partner of James H. Minds and William J. Matz, Lately Trading as Bulah Coal Company, Defendant in Error.

Petition for Writ of Error.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

Your petitioner, The Pennsylvania Railroad Company, Plaintiff in Error, in the above entitled cause, respectfully shows that the above entitled cause is now pending in this Court, and that a judgment has therein been rendered on the 19th day of July, A. D. 1917, affirming a judgment of the District Court of the United States for the Eastern District of Pennsylvania in favor of the defendant in error and against the plaintiff in error, and that the matter in controversy in said suit exceeds one thousand dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in anywise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different states, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and it is not an admiralty case, but that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; therefore your petitioner would respectfully pray that a writ of error be allowed it in the above entitled cause directing the clerk of this Court to send the record and proceedings in said cause with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the specification of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

THE PENNSYLVANIA RAILROAD COMPANY,

(Signed) By HENRY WOLF BIKLÉ,
FRANCIS I. GOWEN,
Its Attorneys.

H. W. B.

October 11, 1917.

Endorsed: No. 2194. Petition for writ of error. Received and filed Oct. 12, 1917. Saunders Lewis, Jr., Clerk.

The foregoing petition is granted and writ of error allowed as prayed for upon plaintiff's giving bond according to law in the sum of $250.

(Signed) JOHN B. McPHERSON,
Circuit Judge.

October 16, 1917.

Endorsed: No. 2194. Order Allowing Writ of Error. Received and filed October 16, 1917. Saunders Lewis, Jr., Clerk.

Bond.

Know all men by these presents, That we, The Pennsylvania Railroad Company, as principal, and United States Guarantee Company, as sureties, are held and firmly bound unto James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, hereinafter called the Obligee, in the full and just sum of Two hundred and fifty dollars ($250.) to be paid to the said James H. Minds surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 17th day of October, in the year of our Lord one thousand nine hundred and seventeen.

Whereas, lately at a session of the United States District Court for the Eastern District of Pennsylvania, in a suit depending in said court between the said James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, and The Pennsylvania Railroad Company, a judgment was rendered against the said The Pennsylvania Railroad Company and in favor of the said James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company in the sum of $16,092.92, which judgment was on appeal to the United States Circuit Court of Appeals for the Third Circuit affirmed on the 19th day of July, 1917, and the said The Pennsylvania Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, citing and admonishing him to be and appear at the Supreme Court of the United States, to be holden at the city of Washington within thirty days.

Now the condition of the above obligation is such, That if the said the Pennsylvania Railroad Company, shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea

good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of

THE PENNSYLVANIA RAILROAD COMPANY,
(Seal of the Company.)
By W. H. MYERS, [SEAL.]
Vice President.

HENRY WOLF BIKLÉ,
Witness as to P. R. R. Co.

Attest:
ROB'T R. GROFF, [SEAL.]
Ass't Secretary.

UNITED STATES GUARANTEE COMPANY. [SEAL.]
(Seal of the Company.)
WILLIAM H. JACKSON,
Att'y in Fact.
EDWARD H. DE BAECKE,
Att'y in Fact.

A. THOMPSON,
Witness as to Surety.

Endorsed: No. 2195. Bond on Writ of Error for Supreme Court. Received and filed Oct. 18, 1917. Saunders Lewis, Jr., Clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court in the case of Pennsylvania Railroad Company, Plaintiff in Error, vs. James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, Defendant in Error, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this twenty-third day of October in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States the one hundred and forty-second.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

In the United States Circuit Court of Appeals for the Third Circuit.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between the Pennsylvania Railroad Company, and James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, a manifest error hath happened, to the great damage of the said Pennsylvania Railroad Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eighteenth day of October, in the year of our Lord one thousand nine hundred and seventeen.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk United States Circuit Court of Appeals for the Third Circuit.

Allowed by

JOHN B. McPHERSON,
Circuit Judge.

UNITED STATES OF AMERICA, *ss:*

To James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the United States Circuit Court of Appeals for the Third Circuit, wherein the Pennsylvania Railroad Co. is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there

be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this eighteenth day of October, in the year of our Lord one thousand nine hundred and seventeen.

[Seal United States Circuit Court of Appeals, Third Circuit.]

JOHN B. McPHERSON,
Circuit Judge.

Service of this citation is accepted on behalf of the defendant in error.

H. W. MOORE,
Counsel for Defendant in Error.

October 19th, 1917.

Endorsed on cover: File No. 26,215. U. S. Circuit Court Appeals, 3d Circuit. Term No. 748. Pennsylvania Railroad Company, plaintiff in error, vs. James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company. Filed October 26th, 1917. File No. 26,215.

(26,216)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 749.

PENNSYLVANIA RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES H. MINDS AND JULIA A. MATZ, TRADING AS BULAH COAL COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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DOCKET ENTRIES

IN THE
DISTRICT COURT OF THE UNITED STATES,
EASTERN DISTRICT OF PENNSYLVANIA.

No. 2424. Dec. Sessions, 1912.

John H. Minds. H. W. Moore.		James H. Minds and Julia A. Matz, trading as Bulah Coal Company,
		vs.
Francis I. Gowen. John G. Johnson.		Pennsylvania Railroad Company.
		PROCEEDING TO ENFORCE ORDER OF INTERSTATE COMMERCE COMMISSION.
1913 Feby.	7	Petition filed. Order on defendant to plead, answer or demur within 30 days filed.
" "	10	Proof of service of copy of petition and order to plead, etc., filed.
" March	4	Demurrer filed.
" July	21	Order overruling demurrer with leave to defendant to plead filed.
1915 Aug.	20	Order for the appearance of John G. Johnson, Esquire, for defendant filed. Plea filed.

"	Oct.	8	Order to place case on Trial List filed.
"	Nov.	9	Jury called.
"	"	10	Trial continued.
"	"	11	Juror withdrawn and cause continued.
1916	April	5	Petition to amend original petition filed.
"	"	8	Answer of Pennsylvania Railroad Company to petition for leave to amend original petition filed.
"	"	10	Order granting leave to plaintiff to amend statement filed with exception to defendant filed.
"	"	14	Defendants pleas to amended petition filed.
"	Oct.	9	Jury called (see minutes).
"	"	10	Trial continued.
"	"	11	Trial continued.
"	"	12	Verdict for plaintiff for Thirty-three thousand six hundred eighteen and 37/100 ($33,618.-37).
"	"	16	Defendant's motion and reasons for new trial filed.
"	Nov.	1	Argued sur motion for new trial.
"	"	6	Opinion Dickinson, J., discharging rule for new trial filed.
"	"	8	Supplemental opinion sur motion for new trial filed.
"	"	10	Praecipe for judgment filed. Judgment accordingly.
			Judgment filed.
			Bill of Exceptions filed.
			Order sealing Bill of Exceptions filed.
			Order, Dickinson, J., allowing counsel fee of $6750.00 filed.

"	"	14 Assignments of Error filed.
		Petition for Writ of Error filed.
		Bond sur Writ of Error in $67,-236.74 with United States Guaranty Company as surety filed.
		Order approving Bond sur Writ of Error filed.
		Justification of Surety with power of attorney filed.
		Order allowing Writ of Error filed.
		Writ of Error allowed and copy thereby lodged in clerk's office for adverse party.
		Citation allowed and issued.
		Praecipe for Transcript of Record sur appeal filed.
"	"	15 Citation returned "service accepted" and filed.

WRIT OF ERROR.

UNITED STATES OF AMERICA, *ss.*

THE PRESIDENT OF THE UNITED STATES,

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania.

GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between James H. Minds and Julia A. Matz, trading as Bulah Coal Company, plaintiff, and Pennsylvania Railroad Company is defendant, a manifest error hath

happened, to the great damage of the said Pennsylvania Railroad Company as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, at Philadelphia, the
(Seal) 14th day of November in the year of our Lord one thousand nine hundred and sixteen.

GEORGE BRODBECK,
Deputy Clerk of the District Court of the United States.

Before DICKINSON, *J.*

Allowed

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

IN THE
DISTRICT COURT OF THE UNITED STATES,
FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

December Term, 1912. No. 2424.

JAMES H. MINDS and JULIA A. MATZ, trading as Bulah Coal Company,
Petitioners,

vs.

PENNSYLVANIA RAILROAD COMPANY,
Defendant.

PETITION.
Filed Feby. 7, 1913.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

Your petitioners, James H. Minds and Julia A. Matz, trading as Bulah Coal Company, having their principal place of business at Ramey, in Bigler Township, Clearfield County and State of Pennsylvania, and who are citizens of the State of Pennsylvania, and respectively residents of Clearfield County and Schuylkill County, in the said State of Pennsylvania, humbly complaining shows your Honors:

I. Your petitioners are lawfully and rightfully entitled to receive and do hereby claim from the defendant above named, the sum of Eighteen thousand five hundred ninety-one dollars and forty-eight cents ($18,591.48) with legal interest thereon from June 28, 1907, to June 1, 1912, amounting to Five thousand four hundred ninety-seven dollars and ninety-one cents ($5,497.91) being the sum of Twenty-four thousand eighty-nine dollars and thirty-nine cents ($24,089.39)

with legal interest thereon from June 1, 1912, as and for damages and reparation in accordance with a report and order of the Interstate Commerce Commission, dated March 11, 1912, a copy whereof is hereto attached, marked "Exhibit A" and prayed to be made and read as part hereof, and in accordance with the several Acts of Congress in such case made and provided; and the defendant justly and legally owes to petitioners the sum above set forth, together with legal interest thereon from June 1, 1912, and a reasonable attorney's fee to be taxed as part of the costs against defendant.

II. The defendant prior to any and all dates mentioned in this petition was and now is a corporation incorporated under the laws of the State of Pennsylvania and a common carrier, engaged in interstate commerce by transportation of passengers and property by continuous carriage by railroad over their own lines and as connecting carriers from points of origin in Pennsylvania to points outside of Pennsylvania throughout the United States and to Canada and Mexico, and has its principal operating office in Philadelphia, Pennsylvania, in the Eastern District of Pennsylvania, through which said City and in which Eastern District of Pennsylvania the line of said defendant runs and is operated.

III. During the period from the first day of October, 1904, to the twenty-eighth day of June, 1907, the petitioners were lessees of valuable seams and veins of bituminous coal underlying lands situate in Bigler Township, Clearfield County, Pennsylvania, and operated thereon a fully equipped colliery known as Webster No. 4, which colliery was adjacent to the tracks of the Moshannon Branch of the Tyrone and Clearfield Railway, one of the main branches of defendant's line and operated by defendant as its Tyrone Division, and, during said period, petitioners were

continuously engaged in mining coal at said mine and selling it to points outside of the State of Pennsylvania, and maintained at said colliery a full mining equipment and a sufficient force of employees. During the same period the daily capacity of said Webster No. 4 mine was five hundred and sixty (560) tons per working day, which quantity petitioners were always able and prepared during said period to mine, ship and sell, had they been supplied by the defendant with sufficient cars to transport the same, but defendant did not furnish petitioners with sufficient cars to transport their coal as aforesaid, nor did it furnish to petitioners their proper pro rata of the cars upon defendant's line, but in its distribution of railroad cars to mines along its line, the defendant unjustly discriminated against petitioners' mine, Webster No. 4, and gave undue and unreasonable preference and advantage to mines operated by the Berwind-White Coal Mining Company, and other shippers on the Tyrone Division, particularly to shippers whose mines were situated upon the Moshannon Branch of the Tyrone Division in close proximity to Webster No. 4, and having, in common with it, their sole outlet to market by way of defendant's lines, whereby defendant violated its duty as a common carrier and petitioners were put to great and unjust disadvantage and were unable to ship coal to market which they were able to mine, and for the sale of which they had orders for delivery to points outside of the State of Pennsylvania, and because of defendant's refusal to adequately supply petitioners' needs for cars and because of such unjust discrimination against petitioners in the daily car distribution of cars upon defendant's line, and in particular upon the Tyrone Division, petitioners were damaged and suffered loss as producers, shippers and sellers of coal in the interstate coal trade and were deprived of profits which they would otherwise have made upon coal which they were unable to ship and sell, and for which

they were unable to accept contracts, although such contracts were available, by reason of defendant's undue and wrongful discrimination and refusal to properly supply them with cars as aforesaid.

IV. The mines owned, operated and controlled by the Berwind-White Coal Mining Company and other favored companies, as aforesaid, are situated upon the Moshannon Branch of the Tyrone & Clearfield Railway, on the Tyrone Division of said defendant in close proximity to the Webster No. 4 mine owned by petitioners, and have a common outlet with petitioners' said mine to reach the markets for bituminous coal either within or without the State of Pennsylvania, over the lines of the defendant company and there are no circumstances or conditions of carriage as against petitioners' mine, Webster No. 4 aforesaid.

Between October 1, 1904, and June 28, 1907, petitioners made daily requests and gave daily orders for coal cars to be delivered to their said mine, to be loaded with coal for transportation to points and places beyond the State of Pennsylvania, but were denied and refused cars and were unduly and unreasonably discriminated against by defendant in the distribution of coal cars, whereby petitioners were at different times and for varying periods of time compelled to close their operation and hold their mine idle, whereby their miners and laborers removed, their organization and plant became demoralized and disorganized, and whereby petitioners were prevented from filling valuable contracts or from accepting and securing other valuable contracts, to their great damage as herein set forth.

During the period from October 1, 1904, to June 28, 1907, the defendant arbitrarily assigned and furnished to the favored mines aforesaid in the Tyrone Division not less than 143,088 "assigned" (arbitrary) cars, which said cars were assigned as "Individual" and "Foreign" cars, and were not charged against the

pro rata share of said favored mines in making up the distribution sheets for said division, and did not enter into the distribution of the coal cars among the mines of said division, whereby said favored companies were given the cars aforesaid over and above and in addition to their *pro rata* of cars in the division, and were illegally and wrongfully preferred in car distribution as aforesaid in said division. And during the same period petitioners' mine, Webster No. 4, received only a few arbitrary cars, and they were charged against said mine's distributive share in the ratings for the division.

During the same period defendant unduly and unjustly discriminated against the Clearfield Division in which petitioners' said mine was located, by arbitrary award of not less than 640 coal cars per day to other divisions, for the use of favored mines in said division, over and above the proper proportion to which said division were properly entitled, to the prejudice of non-favored mines in the Clearfield Division, and in particular of your petitioners' mine, Webster No. 4.

V. Your petitioners, on the twenty-eighth day of June, 1907, duly filed with the Interstate Commerce Commission a complaint setting forth the unjust, unreasonable and discriminatory practices of defendant to the prejudice of petitioners and in violation of the Act to Regulate Commerce, approved February 4, 1887, and Acts amendatory thereof or supplemental thereto, and praying that a hearing be had upon the allegations set forth in said complaint, and that the Commission make an order awarding complainants therein reparation and damages to such an amount as it might be ascertained that said complainants had suffered. Defendant, being duly served with a copy of said complaint, made answer thereto, issue was joined, and the cause regularly heard and argued by all the parties thereto, and submitted, and resulted in

a finding duly filed and reported by the Interstate Commerce Commission at a general session at its offices in Washington, D. C., on Docket No. 1137, Opinion No. 1455, dated December 5, 1910, a copy of which finding, with the conclusions and orders of the Commission, is hereto attached and marked "Exhibit B" and made a part of this petition.

VI. After the filing of briefs by all parties and oral argument had at a general session of the Commission, and the submission of findings of facts and of law on the part of the complainant and of defendant, upon the question of reparation alone, there resulted a further find regularly and properly made by the Commission on March 11, 1912, ordering the defendant to make reparation to petitioners as in paragraph one of this petition above set forth, and as fully appears in the copy of the report, conclusions and order of the Interstate Commerce Commission in Opinion No. 1833, Docket No. 1137, dated March 11, 1912, a certified copy whereof is hereto attached, marked "Exhibit A" and made a part of this petition.

VII. Petitioners aver that a true copy of the aforesaid order of the Interstate Commerce Commission, dated March 11, 1912, Opinion No. 1833, Docket No. 1137, was duly served upon defendant in the above entitled cause and demand made that defendant pay petitioners the sum claimed in this petition and as set forth in the aforesaid order of the Commission, dated March 11, 1912, "Exhibit C." hereto attached, but that defendant has wholly failed, neglected and refused to pay the said sum or any part thereof, and that no such sum nor any part thereof has been paid by defendant or any one on its behalf to petitioners or any one in their behalf. Wherefore petitioners have instituted this proceeding to enforce the aforesaid order regularly and lawfully made under the Act to Regulate

Commerce, approved February 4, 1887, and the acts amendatory thereof or supplemental thereto.

Wherefore the said James H. Minds and Julia A. Matz, trading as the Bulah Coal Company, as aforesaid, respectfully pray:

First.—That your Honorable Court enter a rule and order upon the said defendant, the Pennsylvania Railroad Company, to file a plea, answer or demurrer to this petition within thirty days from date of service of a copy of the same upon said defendant.

Second.—That your Honorable Court will, by its order, fix a time and place for the trial of this cause, under the provision of the Act to Regulate Commerce aforesaid.

Third.—That your Honorable Court will hear, determine and adjudicate the matter involved in this cause hereinabove recited and the exhibits hereto attached.

Fourth.—That your Honorable Court will enter judgment in favor of petitioners and against the said defendant, the Pennsylvania Railroad Company, for the sum of Twenty-four thousand eighty-nine dollars and thirty-nine cents ($24,089.39), as hereinbefore set forth, with legal interest thereon from June 1, 1912, and costs, including a reasonable attorney's fee.

Fifth.—That your Honorable Court may make such other order or orders in the premises as the necessity of the case may require or as to your Honorable Court may seem meet.

And your petitioners, as in duty bound, will ever pray, etc.

JAMES H. MINDS.

STATE OF PENNSYLVANIA, *ss.*

James H. Minds, one of the above-named petitioners, being duly sworn according to law, doth depose and say that the facts contained in the foregoing petition are true to the best of his knowledge and belief.

JAMES H. MINDS.

Sworn and subscribed to before me
this 31st day of January, 1913.

JOHN B. MCGRATH,
(Seal) *Notary Public.*
My commission expires February 27, 1913.

INTERSTATE COMMERCE COMMISSION,
WASHINGTON.

I, John H. Marble, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached are true copies of the Report and Order of the Commission entered March 11, 1912, in cases No. 1136, James H. Minds and Julia A. Matz, trading as The Bulah Coal Company against Pennsylvania Railroad Company, and No. 1137, James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as The Bulah Coal Company against Pennsylvania Railroad Company, the originals of which are now on file and of record in the office of this Commission.

(Seal) In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of the Commission, this 18th day of January, 1913.

JOHN H. MARBLE,
Secretary of the Interstate Commerce Commission.

Opinion No. 1833.

INTERSTATE COMMERCE COMMISSION.

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

PENNSYLVANIA RAILROAD COMPANY.

No. 1139.

W. F. JACOBY and ISAAC C. WEBER, Trading as W. F. JACOBY & COMPANY,

v.

SAME.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY

v.

SAME.

No. 1136.

JAMES H. MINDS and JULIA A. MATZ, Trading as THE BULAH COAL COMPANY,

v.

SAME.

No. 1137.

JAMES H. MINDS, Surviving and Liquidating Partner of JAMES H. MINDS and WILLIAM J. MATZ, Lately Trading as THE BULAH COAL COMPANY,

v.

SAME.

Submitted April 20, 1911; *Decided March* 11, 1912.

Reparation awarded for damages resulting from discriminations practiced by the defendant in the distribution of coal cars.

David L. Krebs, Harry White and *A. M. Liveright* for Hillsdale Coal and Coke Company and Clark Brothers Coal Mining Company.

William A. Glasgow, Jr., and *John H. Hall* for W. F. Jacoby & Company.

H. W. Moore, George M. Roads, John H. Minds, William H. Patterson and *James H. Gleason* for Bulah Coal Company.

George V. Massey, Francis I. Gowen and *Murray & O'Laughlin* for defendant.

SUPPLEMENTAL REPORT OF THE COMMISSION.

HARLAN, *Commissioner*:

In *Joynes v. P. R. R. Co.*, 17 I. C. C., 361, it was alleged that the defendant had given a preferred use of its terminal facilities in Pittsburgh to certain shippers of fruits and vegetables, in consequence of which the complainant had sustained loss by reason of the decay of certain of his shipments due to the delay in setting his cars at the unloading platform. We declined to make an award, three Commissioners dissenting, on the ground that this Commission was not authorized under the act to award damages of that character. The general principle announced was that money demands of that nature, arising out of discriminations ascertained and found by the Commission to have been practiced by an interstate carrier, are cognizable only in the courts, and that our jurisdiction extends to what is there referred to as rate damages, as distinguished from general damages of the kind demanded.

These complaints, in which the same defendant was charged with discrimination in the distribution of its coal-car equipment and in which general damages are alleged to have been sustained by the petitioners by reason of its unlawful practices in that regard, were then pending before the Commission. While they were still under consideration and after our con-

clusions in *Joynes v. P. R. R. Co., supra,* had been announced, the Circuit Court of the United States for the Eastern District of Pennsylvania, in *Morrisdale Coal Co. v. P. R. R. Co.,* 176 Fed., 748, dismissed an action for damages alleged to have been sustained by reason of the same rules and regulations of the Pennsylvania Railroad respecting the distribution of its coal cars as are involved in the cases now before us. The claim was based on discrimination, and the authority of the Court had been invoked not only to determine that discrimination had been practiced by the defendant against the plaintiff, but also to ascertain and enter judgment for the damages so sustained. The Court held that this Commission alone could entertain a complaint of that nature. See also *Morrisdale Coal Co. v. P. R. R. Co.,* 183 Fed., 929.

It will be seen therefore that with respect to the principle announced in *Joynes v. P. R. R. Co., supra,* there is a conflict of view as between the Commission and the very court to which these complainants, if refused any relief here, would doubtless have to resort to secure a judgment for the damages here claimed to have been sustained. In order, therefore, to prevent a failure of justice in these cases, as well as to create an opportunity to secure a final ruling by the courts as to what should be our course of action in the future in such cases, we concluded to proceed with these claims; and having found that undue discriminations had been practiced by the defendant against the complainants, we ordered a reargument on the question of the amount of damages respectively sustained by them by reason thereof.

The history of the complaints, the issues raised by the pleadings, and our course in dealing with them, are fully explained in our previous reports herein. *Hillsdale Coal & Coke Co. v. P. R. R. Co.,* 19 I. C. C., 356; *Jacoby & Co. v. P. R. R. Co.,* 19 I. C. C., 392; and *Bulah Coal Co. v. P. R. R. Co.,* 20 I. C. C., 52. And

therefore, in proceeding for the reasons explained to exercise jurisdiction to award damages, no statement of the facts need be made. It will suffice to refer to our reports in the cases cited. The record has now been carefully studied with a view to arriving at the amount of damages which each of the complainants is shown to have sustained, and we shall briefly announce our conclusions:

Claim of the Hillsdale Company.

We find that as a result of the discriminatory acts of the defendant the Hillsdale Coal & Coke Company was damaged in the sum of $27,193.01, which it is entitled to recover, with interest from May 9, 1907.

The original claim was for $127,855.65, which upon reargument was restated as $108,207.05, based on the assumption of a full car supply. A more conservative claim of $65,434.87 was also made in the brief on reargument, based on an assumed output of 600 tons per day and what is claimed would have been a fair distribution of cars to this division of the defendant's lines and a fair share to these mines. Giving full weight to all that we find of record, however, we have been unable to find any clear basis for awarding this sum. Nor is there sufficient proof to enable us in this claim to make any finding with respect to the damages alleged to have been sustained by reason of the excess cost of mining the coal actually shipped to interstate destinations resulting from the irregular and inefficient working of the mine due to the failure of the defendant to furnish a regular and adequate supply of cars.

In arriving at our conclusion we have divided the time into two periods, the first from October 1, 1903, to March 31, 1906, after which the mines in this district were closed down for several months as the result of a strike; and the second from August 1, 1906, to May 1, 1907. We find the following facts estab-

lished by the complainant's proof, and have used them as factors in calculating the damages:

(*a*) That the complainant's mines, known as Hillsdale Nos. 2 and 3, during each of the two periods could have produced and disposed of an average of 500 tons of coal per working day; and that 22 working days would have been an average working month.

(*b*) That if the complainant had received its proper proportion of the cars available for distribution by the defendant it could have shipped and disposed of 143,880 tons during the first period and 67,795.20 during the second period; that it actually shipped during the two periods 45,059.84 tons and 35,719.25 tons, respectively, making a shortage in its output of 98,820.16 tons during the first period and 32,075.95 during the latter period; that of this tonnage 87,831.36 tons would have moved to points without the State of Pennsylvania during the earlier period and 15,662.68 during the latter period. In other words, we find that the quantity of coal which the complainant was prevented from selling and shipping to interstate destinations as the result of the discrimination against it in the matter of car supply was 87,831.36 tons and 15,662.68 tons for the periods named.

(*c*) That the average selling price for the coal at the mine for interstate markets would have been $1.0711 per ton during the first period and $1.1320 during the second period; that the cost of production during the same periods with its proper proportion of cars would have been 81 cents and 86 cents per ton, respectively; and that the profit lost on the shipments and sales which the complainant was prevented by the discriminatory acts in question from making during the first period was 26.11 cents per ton and during the second period 27.2 cents.

We have attached no importance to the fact, but for a better understanding of the situation it may be well to state, that this complainant has recovered of the

defendant a judgment in the sum of $17,500 in an action in the State courts similar to this proceeding, but relating only to intrastate traffic. *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 229 Pa., 61; 78 Atl., 28.

Claim of Jacoby & Company.

We find that by reason of the discriminations ascertained and set forth in our report in *Jacoby v. P. R. R. Co.*, 19 I. C. C., 392, the complainants were damaged to the extent of $21,094.39, which they are entitled to recover with interest from June 28, 1907.

The claimants here demand $51,950.49. The award above made we base upon evidence adduced of record, from which we find:

(*a*) That the fair rating of the mine for the time in question, as fixed by the defendant and not objected to by the complainants, was 450 tons per day.

(*b*) That during the period from April, 1904, to March 31, 1905, the mine was operated 275 days; and that during the second period named on the exhibits, from April 1 to October 18, 1905, it was operated 138¼ days.

(*c*) That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods.

(*d*) That the average selling price of the complainants' product for the first period was $1.212 per ton, and in the second period $1.1670; that the cost of production, based on economical operation of the mine with a fair car supply, would have been 92 cents during the entire period of the action; and that the profit during the first period would therefore have been 29.2 cents and during the second period 24.7 cents per ton.

This measures the loss on the tonnage which the complainant was unable to ship.

(*e*) That the actual cost of production is shown by the record as $1.016 per ton during the first period and $1.049 per ton during the second period, making an excess of 9.6 cents and 12.9 cents for the respective periods in the actual cost of production under the conditions obtaining, as compared with what would have been the cost based on a fair car supply as heretofore stated. This is the basis adopted for computing the loss sustained by these complainants in diminished profits on the coal actually shipped during the period in question.

We further find that the complainants in the sale of their mine realized a profit of $7,500 over the purchase price which they had paid. But we do not undertake to say whether or not this amount or any part of it should be deducted from the amount of reparation here awarded.

Claim of Clark Brothers Company.

The discrimination practiced by the defendant against Clark Brothers Coal Mining Company is set forth in *Jacoby v. P. R. R. Co.*, 19 I. C. C., 392. We now find that the damages sustained by this claimant as the result thereof amounted to $31,127.96, and that it is entitled to an award of reparation in that sum, with interest from June 25, 1907.

The amount of its claim as stated in the original petition was $36,401.12. Our findings of fact, on which we arrive at this conclusion, are as follows:

(*a*) That the mines known as Falcon Nos. 2, 3 and 4 had an average output capacity of 600 tons, 120 tons and 275 tons per working day, respectively, for the period of the action; and that 20 working days would have been an average working month.

(*b*) That dividing the time in question into two periods, one prior to March 31, 1906, and the other

from August 1, 1906, to May 1, 1907, as we have done in the *Hillsdale case, supra,* the complainant could have disposed of and shipped 38,537.40 tons from Falcon No. 2 during the first period and 74,498.40 tons during the second period; that it actually shipped from that mine 11,812.76 tons and 21,326.18 tons in the respective periods, making a shortage in the output of 26,724.64 tons during the first period and 53,172.22 tons during the second period; and that of this tonnage it would have shipped and sold at interstate destinations 19,086.73 tons during the first period, and 35,109.61 tons during the second period.

(*c*) That from Falcon No. 3 the complainant could have shipped and sold 7,707.48 tons during the first period and 14,899.68 during the second period, if it had received its proper share of equipment; that it actually shipped from this mine during those periods 1,184.66 tons and 3,018.90 tons, respectively, making its output 6,522.82 tons during the first period and 11,880.78 during the second period less than it would have been with the proper car supply; and that of the figures last mentioned it would have shipped to points without the State of Pennsylvania 3,866.72 tons and 6,423.93 tons in the respective periods.

(*d*) That with its proper proportion of cars the mine known as Falcon No. 4 could have produced, sold and shipped during the first period 12,210 tons and during the second period 34,145.10 tons, whereas it actually was able to ship but 2,306.12 tons and 11,105.45 tons; that it therefore shipped 9,903.88 tons during the first period and during the second period 23,039.65 tons less than it would have sold and shipped with its proper proportion of the cars; and that of this shortage 9,184.85 tons represents what would have been interstate business during the first period, and 8,497.02 tons during the second period.

(*e*) That the average selling price of the coal mined at Falcon No. 2 during the first period was $1.289 per ton and during the second period $1.25 per

ton; that the cost of production at that mine, based on a fair car supply, would have been 92 cents per ton and 96 cents per ton during the respective periods; that the average selling price of the coal from Falcon No. 3 was $1.20 during both periods and the cost of production 92 cents and 96 cents during the two periods; that the average selling price at Falcon No. 4 was $1.07 per ton during the first period and $1.132 per ton during the second period, and that the cost of production at that mine was 82 cents per ton and 86 cents per ton during the respective periods. The profit that would have accrued on the output of the respective mines was therefore as follows: Falcon No. 2, 36.9 cents and 29 cents; Falcon No. 3, 28 cents and 24 cents; and Falcon No. 4, 25 cents and 27.2 cents per ton. This measures the loss on the tonnage which the complainants were unable to ship.

(*f*) That the actual cost of production is shown by the record as $1.1419 per ton during the first period and $1.2063 per ton during the second period at Falcon No. 2; that the actual cost at Falcon No. 3 was $1.166 per ton during the first period and $1.311 per ton during the second period; that the actual cost at Falcon No. 4 was $1.017 and 90 cents during the respective periods; and that the excess over the cost of production, as shown in the preceding paragraph herein, resulting from the irregular car supply, was 22.19 and 24.63 cents per ton, respectively, at Falcon No. 2; 24.6 and 35.1 at Falcon No. 3, and 19.7 and 4 cents for the respective periods at Falcon No. 4. This is the measure we have used in arriving at the loss sustained by these complainants in increased cost of producing the coal actually sold and shipped to interstate points during the period in question.

Claim of Bulah Coal Company.

Following our conclusion in *Bulah Coal Co. v. P. R. R. Co.*, 20 I. C. C., 52, that the defendant had unlawfully discriminated against these complainants, we

now assess the damages resulting therefrom at $50,307.05, with interest from June 28, 1907.

The reparation prayed for by the complainants aggregates $155,401.59. In our previous report we took April 12, 1904, as the date for dividing the period of the action. Upon further reflection October 1, 1904, seems more proper, that being the date of the formation of the new co-partnership. In arriving at the foregoing amount of reparation we have therefore considered the matter in two periods, one prior and the other subsequent to that date, and make the following findings:

(*a*) That the fair rating of the mine, fixed by the defendant without objection by the complainants, was 560 tons during both of the periods referred to.

(*b*) That 22 working days would in this case have been an average working month, although it is alleged that the mine could have been worked 26 days per month.

(*c*) That if the complainants had received their proper proportion of the cars available for distribution they could have mined, sold and shipped 120,415.68 tons during the first period and 214,257.12 tons during the second period; that they actually shipped during the two periods 110,892 and 143,000 tons, respectively, making a shortage in their output of 9,523.68 tons in the first period and 71,257.12 tons for the second period; and that of this tonnage 3,878.04 tons during the first period and 48,540.34 tons during the second period would have moved to and have been sold at interstate destinations.

(*d*) That the average profit on orders received by the complainants for points without the State of Pennsylvania, and which were canceled and unfilled as the result of lack of their fair proportion of available equipment, would have been 71.8 cents per ton during the first period and 25.2 cents per ton during the latter period. This measures the complainants'

loss on the coal which they were unable to ship during the period of action, and the damages allowed on this ground aggregate $15,016.60.

(*e*) That the cost of production at the complainants' mine during the first period was $1.23 per ton on the average, and during the second period $1.08; that the cost of production would have been 88 cents per ton during both periods if a non-discriminatory share of the car supply had been received; and that the excess in the actual cost of production of the coal mined and shipped to interstate destinations resulting from the discrimination in car supply was therefore 35 cents per ton during the first period and 20 cents during the second period. This is the measure of the complainants' damages in the excess cost of production on the coal actually sold and shipped to points outside the State of Pennsylvania during the period of the action; and the damages awarded on that ground aggregates $35,290.45.

In cases of this kind there is a natural tendency on one side to enlarge and on the other to minimize the claim made. This is characteristic of the record before us. Damages are claimed by the petitioners to an extent not supported by the evidence adduced; on the other hand, the defendant has not sought so much to help the Commission to arrive at a correct award as to show the fallacious character of the factors adopted by the complainants in arriving at their estimates of their damages. The result is a record that is not so helpful as it might be. The responsibility for this, however, rests with the parties; in such a case we can accept only the responsibility that follows upon a careful study of the record and an earnest effort to weigh all the evidence before us and to reach such conclusions as it fairly justifies.

Many theories as to the elements that should be considered in estimating damages in a case of this kind were advanced by each side. It is said by the

complainants that their damages should be estimated on the basis of a supply of coal cars according to the physical capacity of their mines, or at least on the basis of their rated capacity. We have dealt with the claims only on the basis of the fair proportion of the available equipment that each claimant was entitled to receive in view of what we here find would have been a proper rating for each operation. According to the argument and brief on behalf of the defendant there is no sound theory upon which the damages of the complainants may be calculated. The defendant contends in all these cases that the coal which the complainants were unable to mine because of their failure to obtain their fair share of cars still remained in the ground, and that the extent of the damage really suffered can not therefore be ascertained without proof, showing that the coal when subsequently mined was sold at a less profit than might have been realized during the period of the action. We are not prepared to enter upon a discussion of that question. Such claims are clearly justiciable, and we know of no better guide or basis for our action than the rule followed by the courts in similar cases. In the action by the Hillsdale Coal & Coke Company in the State courts, to which reference has heretofore been made, the Supreme Court of Pennsylvania, in 229 Pa., 261; 78 Atl., 28, said:

> "As we look at it, the only known method to get at data from which to estimate what a man is damaged by reason of discrimination, in not furnishing cars or other facilities of transportation, is to give the shipper discriminated against what would have been a reasonably fair profit on whatever is shown to be the fairly probable output of the mine discriminated against, less what was actually shipped from that mine. * * * Counsel for appellant argued that because, as a result of the defendant's discrimination, the coal of the plaintiff was left in the ground, and might be

available for future shipment, and as there was no evidence that prices which prevailed throughout the period of the action were abnormal, or in excess of those reasonably ruling, there was no room for the inference that the plaintiff would realize for his coal when it might be shipped in the future less than it would have realized if shipped during the period of the action. But the burden was upon the defendant to show anything of this kind, by way of mitigation of damages, if it could do so, and it offered no evidence for any such purpose."

We do not undertake to say whether this is a correct rule, but simply refer to the case in explanation of our findings.

Orders will be entered in accordance with these conclusions.

SUPPLEMENTAL ORDERS.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 11th day of March, A. D. 1912.

No. 1063.

HILLSDALE COAL & COKE COMPANY

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with

the report herein of March 7, 1910, 19 I. C. C. 356, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainant, Hillsdale Coal & Coke Company, on or before the 1st day of June, 1912, the sum of $27,193.01, with interest thereon at the rate of 6 per cent. per annum from May 9, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1139.

W. F. JACOBY and ISAAC C. WEBER, Trading as W. F. JACOBY & COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C., 392, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainant, W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Company, on or before the 1st day of June, 1912, the sum of $21,094.39, with interest thereon at the rate of 6 per cent. per annum from June

28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1111.

CLARK BROTHERS COAL MINING COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of March 7, 1910, 19 I. C. C., 392, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainant, Clark Brothers Coal Mining Company, on or before the 1st day of June, 1912, the sum of $31,-127.96, with interest thereon at the rate of 6 per cent. per annum from June 25, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1136.

JAMES H. MINDS and JULIA A. MATZ, Trading as The BULAH COAL COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of December 5, 1910, 20 I. C. C., 52, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainants, James H. Minds and Julia A. Matz, trading as The Bulah Coal Company, on or before the 1st day of June, 1912, the sum of $31,715.57, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

No. 1137.

JAMES H. MINDS, Surviving and Liquidating Partner of JAMES H. MINDS and WILLIAM J. MATZ, Lately Trading as THE BULAH COAL COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

This case coming on to be further heard upon application for reparation, and having been submitted

by the parties, and full investigation of the matters and things involved having been had, and the Commission having, on the date hereof, made and filed a supplemental report containing its findings of fact and conclusions thereon, which said report, together with the report herein of December 5, 1910, 20 I. C. C., 52, and all the findings and conclusions in said reports, are hereby referred to and made a part hereof:

It is ordered, That the above-named defendant be, and it is hereby, authorized and directed to pay unto complainant, James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as The Bulah Coal Company, on or before the 1st day of June, 1912, the sum of $18,591.48, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.

By the Commission.

JOHN H. MARBLE,
(Seal) *Secretary.*

INTERSTATE COMMERCE COMMISSION,
WASHINGTON.

I, John H. Marble, Secretary of the Interstate Commerce Commission, do hereby certify that the papers hereto attached are true copies of the Report and Order of the Commission entered December 5, 1910, in cases No. 1136, James H. Minds and Julia A. Matz, trading as the Bulah Coal Company, against Pennsylvania Railroad Company, and No. 1137, James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as The Bulah Coal Company against Pennsylvania Railroad

Company, the originals of which are now on file and of record in the office of this Commission.

In Testimony Whereof, I have hereunto subscribed my name, and affixed the seal of the Commission, this 18th day of January, 1913.

(Seal)

JOHN H. MARBLE,
Secretary of the Interstate Commerce Commission.

Opinion No. 1455.

BEFORE THE
INTERSTATE COMMERCE COMMISSION.

No. 1136.

JAMES H. MINDS AND JULIA A. MATZ, TRADING AS THE BULAH COAL COMPANY,

v.

PENNSYLVANIA RAILROAD COMPANY.

No. 1137.

JAMES H. MINDS, SURVIVING AND LIQUIDATING PARTNER OF JAMES H. MINDS AND WILLIAM J. MATZ, LATELY TRADING AS THE BULAH COAL COMPANY,

v.

SAME.

Submitted February 1, 1909.
Decided December 5, 1910.

REPORT AND ORDER OF THE COMMISSION.

Upon complaint that the defendant's system of rating mines and distributing its coal-car equipment is discriminatory, it is so found, and *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 19 I. C. C. Rep., 356,

and the other cases in that group of cases, are cited and reaffirmed. The question of damages is reserved for further argument.

H. W. Moore, George M. Roads, John H. Minds, William H. Patterson, David L. Krebs, and *James H. Gleason* for complainants.

Francis I. Gowen, George V. Massey, and *Murray & O'Laughlin* for defendant.

REPORT OF THE COMMISSION.

HARLAN, *Commissioner*:

On or about April 12, 1904, a member of the copartnership that filed the first of these two complaints died, and his place in the firm was taken by his widow. This change in interest is the explanation of the two complaints; the first one prays for damages in the sum of $80,174.60, alleged to have been sustained prior to that date, and the second demands an award in the sum of $75,226.99 for damages alleged to have been suffered after that date. The claims in each case are based upon the allegation that the defendant was guilty of unjust discrimination against the complainants in the distribution of its coal-car equipment during the period covered by the complaints and also failed to furnish the complainants with an adequate supply of cars. We are also asked to require the defendant hereafter to furnish the complainants, in the daily distribution, with their just proportion of its available coal-car equipment, that proportion to be ascertained by the physical output capacity of the mines served by the defendant, without regard to their so-called commercial capacity.

This question in all of its aspects was fully considered in *Hillsdale Coal & Coke Co. v. P. R. R. Co.,* 19 I. C. C. Rep., 356; *Jacoby & Co. v. P. R. R. Co.,* 19 I. C. C. Rep., 386; and the other cases there referred to and which were disposed of at the same time. It will not

be necessary therefore again to consider it here. It will suffice to say that we find upon this record that the defendant, during the period covered by these actions, was guilty of an undue and unjust discrimination against the complainants, by reason of the enforcement of the rules then in effect for the distribution of its available coal cars among the mining operations that it served; and an order in that regard will be entered herein substantially similar to the orders entered in the cases above mentioned. As those orders require the defendant to put in effect for the future a non-discriminatory system of car distribution no further order in that regard need be entered here.

In addition to the damages alleged to have been suffered by the complainants by reason of the defendant's rules of distribution, there are one or two other matters that must be mentioned. The mine of these complainants, known as Webster No. 4, is in the vicinity of the operations involved in *Jacoby & Co. v. P. R. R. Co., supra,* and is connected by a switch track with the defendant's Moshannon branch. It produces a superior quality of soft coal that is used for steaming and forging purposes and also as a domestic coal; it is in good demand and brings a high price in the markets of consumption. The tipple, mining machinery, and the general development of the mine were designed for a shipping capacity of from 1,000 to 1,200 tons of coal per working day. Its capacity, as rated by the defendant in 1906, was 16 thirty-five ton cars per day, or 560 tons, indicating a maximum monthly output of 14,000 tons. At the same time the defendant rated Eureka Mine No. 7, about half a mile distant on the same mineral and surface estates and belonging to the Berwynd-White Coal Mining Company, at 14 cars per day. Although defendant gave the two mines about the same rated capacity, the latter mine seems to have received not only a more substantial and regular supply, but a larger number of cars each month.

On that point the defense interposed is that the petitioners received their fair proportion of the entire number of cars distributed on the Tyrone division, and therefore have no ground for complaint. A similar defense was made in *Hillsdale Coal & Coke Co. v. P. R. R. Co., supra,* but we there held that under the law a shipper has the right not only to receive its fair and full proportion and use of a carrier's equipment and facilities, but may protest against the giving to a competitor of a supply of cars in excess of his fair and just proportion. We repeat that principle here. It is one of great importance in coal-mining operations, as all will agree who have looked into such matters. One of the evils lying at the root of the trouble is that the mine that has a larger and more constant supply of cars may not only be operated at less cost, but, what is equally if not more important, such a mine is able to attract miners from the other mines because of the assurance it gives of a more constant opportunity to earn a daily wage.

The greater regularity of the car supply made available to the Berwynd-White Coal Mining Company operations, as is pointed out in *Jacoby & Co. v. P. R. R. Co., supra,* is partly explained by the fact that that company not only owned a large supply of private cars, but had railway-fuel contracts which, under the rules for distribution then in effect, resulted in giving it a large and regular number of assigned cars. This discrimination, as was pointed out in the cases referred to, resulted from the rules then in effect and need not be further considered here. In this connection it may be well to say that the complainants predicate a part of their damages upon the fact that in 1902 the defendant sold 1,000 of its system coal cars to the Berwynd-White Coal Mining Company, 500 to the Keystone Coal & Coke Company, and 700 to the Ellsworth Coal Company. The defendant meets this claim by asserting that if these cars had been retained as system cars

they would have added to the car supply of the complainants during the time in question only a fraction of a car per day. We have not verified this assertion, but any damage resulting from the sale by the defendant of a portion of its own equipment to other coal companies is substantially covered by our finding that the proper practice in the distribution of all available cars was to count all assigned cars against the equipment of the mine receiving them.

The complainants characterize as a special discrimination against their mine the fact, as is alleged, that they repeatedly had great difficulty in getting the trainmen and agents of the defendants to place on their siding and at their tipple the cars that had been assigned for delivery to them. It is said that the cars were frequently left at the foot of the siding and that the complainants had to pull them into place with mules. It is also said that the cars were frequently delivered so late in the morning as not to leave them available during that day, and that cars delivered late in the day were not infrequently charged against that day's quota of cars and against the quota of the following day as well. On these matters, however, we do not find a sufficient basis in the record for affirmative conclusions or anything to indicate that the complainants, in those respects, were put by the defendants on any less favorable basis than their competitors.

Another fact which is made a ground for a claim of damages is that in 1903 the complainants asked the privilege of purchasing certain cars for use in transporting coal from their mine, but were informed by the defendant that they were discouraging the use of new individual car contracts. Later the complainants negotiated for the purchase of 100 wooden gondola cars, which at that time were in actual use in the transportation of coal by another mining company over the lines of the defendant; but the defendant declined to permit their use by the complainant on the ground that

the cars were not up to standard. The negotiations were therefore not carried to a conclusion, but apparently the cars were still in use, when these complaints were filed, for the transportation of coal by the defendant for other shippers. Later there was some controversy with respect to the use of 25 new steel cars purchased by the complainants for their own use, but which were kept temporarily out of service, pending some dispute between the complainants and the defendant with respect to the terms of the contract covering their use as private cars.

While there are also other things shown of record which put the defendant on explanation and properly subject it to just criticism, the only point upon which the record affords a sufficient basis for affirmative findings grows out of the rules and system then in effect for the distribution of available equipment among the various coal mining operations. We have condemned that system in the cases heretofore alluded to and found it to be unduly and unjustly discriminatory, and we have so found here. But as was the case with those proceedings we desire further light on the amount of the damages thus sustained. The latter question will therefore be set for further argument at the time when the same question is argued in the group of cases heretofore mentioned. The special reasons for entering upon the consideration of the question of damages in these cases have been explained in *Hillsdale Coal & Coke Co. v. P. R. R. Co.*, 19 I. C. C. Rep., 356.

An order will be entered in accordance with these conclusions.

PROUTY, *Commissioner*, dissenting: Without restating my views in this proceeding I desire it to be understood that my dissent in the case last cited is equally applicable here. In that dissent Commissioner Clements joined. It is the desire also of Commissioner Lane to be understood as entertaining in this proceed-

ing the same views respecting the lawful basis for rating mines for the distribution of coal cars that are expressed in his dissenting opinion in the case last mentioned.

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at is office in Washington, D. C., on the 5th day of December, A. D. 1910.

Present:

MARTIN A. KNAPP,
JUDSON C. CLEMENTS,
CHARLES A. PROUTY,
FRANCIS M. COCKRELL,
FRANKLIN K. LANE,
EDGAR E. CLARK,
JAMES S. HARLAN,
} Commissioners.

No. 1136.

JAMES H. MINDS AND JULIA A. MATZ, TRADING AS THE BULAH COAL COMPANY,

v.

THE PENNSYLVANIA RAILROAD COMPANY.

No. 1137.

JAMES H. MINDS, SURVIVING AND LIQUIDATING PARTNER OF JAMES H. MINDS AND WILLIAM J. MATZ, LATELY TRADING AS THE BULAH COAL COMPANY,

v.

SAME.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the mat-

ters and things involved having been had, and the Commission having, on the date hereof, made and filed a report containing its conclusions thereon, which said report is made a part hereof; and it appearing that it has been the defendant's rule, regulation, and practice, in distributing coal cars among the various coal operators on its lines for interstate shipments during percentage periods, to deduct the capacity in tons of foreign railway fuel cars, private cars, and system fuel cars, in the record herein referred to as "assigned cars," from the rated capacity in tons of the particular mine receiving such cars and to regard the remainder as the rated capacity of that mine in the distribution of all "unassigned" cars:

It is ordered, That the said rule, regulation, and practice of the defendant in that behalf unduly discriminates against the complainants herein and is in violation of the third section of the act to regulate commerce.

It is further ordered, That the question of the damages claimed by the complainants in these proceedings in respect of the matters and things in said report found to be discriminatory be deferred pending further argument in the premises.

NOTICE.

To the Pennsylvania Railroad Company, Defendant in above case:

Attached hereto will be found a true copy of the order made by the Interstate Commerce Commission dated March 11, 1912, Opinion No. 1833, Docket 1137, awarding to the complainants the sum of Eighteen thousand five hundred ninety-one dollars and forty-eight cents ($18,591.48), with legal interest thereon from June 28, 1907, to June 1, 1912, as and for damages and reparations and in accordance with the report and order of the Interstate Commerce Commission.

Demand for payment thereof is now formally made on behalf of the complainants and unless payment of this award is received by February 5, 1913, a petition will be filed in the United States Court for the purpose of enforcing the order and award aforesaid.

H. W. Moore,
Atty. for Petitioner.

ORDER OF COURT.
Filed Feby. 7, 1913.

And now, February 7th, 1913, the petition of James H. Minds and Julia A. Matz, trading as Bulah Coal Company, complainants in the above proceedings having been filed and the averments thereof considered it is ordered that the Pennsylvania Railroad Company, defendant, be and is directed and ruled to file a plea, answer or demurrer to said petition within thirty days of the service of a copy of said petition together with a copy of this order or judgment sec. leg.

J. W. Thompson, *J.*

DEMURRER OF DEFENDANT TO PETITION OF THE PETITIONERS.
Filed March 4, 1913.

The Pennsylvania Railroad Company, the defendant in the above entitled action, by protestation, not confessing or acknowledging all or any of the matters or things in the said petition contained to be true in such manner and form as the same are therein set forth and alleged, demurs to the said petition, and for causes of demurrer shows:

1. That it appears from the petition itself that the petitioners are not entitled to maintain the action.

2. That it appears from the petition that the action or proceeding has been brought to recover the amount of a certain award made in favor of the petitioners and against the defendant by the Interstate Commerce Commission, which said award the said Commission was without authority to make, because the authority conferred by the Acts of Congress creating the said Commission and defining its powers and jurisdiction does not extend to nor include the making of awards of the character of that which forms the basis of the present action, nor has the said Commission been empowered by said Acts of Congress to entertain claims for damages of the character asserted by the petitioners in the proceeding instituted by them before the Commission which eventuated in the making of the said award.

Wherefore, and for divers other good causes of demurrer appearing on the said petition, this defendant doth demur thereto. And it prays the judgment of this Honorable Court, whether it shall be compelled to make any answer to the said petition; and it humbly prays to be hence dismissed with its reasonable costs in this behalf sustained.

JOHN G. JOHNSON,
Solicitor and Counsel for Defendant,
The Pennsylvania Railroad Company.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

JOHN G. JOHNSON,
Of Counsel for Defendant, The Pennsylvania Railroad Company,
Philadelphia, March 1, 1913.

STATE OF PENNSYLVANIA, }
CITY AND COUNTY OF PHILADELPHIA. } *ss.*

Lewis Neilson, being duly sworn, deposes and says: I am Secretary of the Pennsylvania Railroad Company, the above named defendant. The foregoing demurrer is not interposed for delay.

LEWIS NEILSON.

Sworn to before me this 28th day of February, 1913.

HENRY E. CAIN,
(Seal) *Notary Public.*
Commission expires February 21, 1915.

ORDER OF COURT.
Filed July 21, 1913.

Before THOMPSON, *J.*

AND NOW, to wit: this 21st day of July, 1913, IT IS ORDERED that the Demurrer in the above entitled cause be overruled, with leave to plead, &c.

BY THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

PLEA.
Filed Aug. 20, 1913.

Defendant in the above pleads "Not Guilty."

JOHN G. JOHNSON,
Attorney for said Defendant.

August 20th, 1913.

(For Petition to Amend Original Petition and Amended Petition, see page 41 of Record in case of James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company.)

SUR PETITION FOR LEAVE TO AMEND ORIGINAL PETITION.

ANSWER OF THE PENNSYLVANIA RAILROAD COMPANY.
Filed Apr. 8, 1916.

To the Honorable the Judges of said Court:

The Pennsylvania Railroad Company, the defendant in the above entitled action, respectfully submits that leave should not be granted to file the amended petition which the plaintiffs ask leave to file, for the following reason:

The proceeding, as the petition discloses, is one brought to recover the amount of an award averred in the petition to have been made by the Interstate Commerce Commission on March 11, 1912.

The award, as now appears, for the recovery of which the proceeding was brought, was not made in favor of the plaintiffs, and the purpose of the present petition is to permit the plaintiffs to so amend their original petition as to enable them now to recover the amount of an award which was made by the Interstate Commerce Commission in favor of the petitioners.

The Interstate Commerce Act provides that "a petition for the enforcement of an order (i. e., of the Interstate Commerce Commission) for the payment of money shall be filed in the Circuit Court or State Court within one year from the date of the order, and not after."

The date of the order making the award for the recovery of which the plaintiffs now desire to proceed was, as already stated, March 11, 1912, so that at the present time more than four years have elapsed from the date thereof. The petitioners, therefore, it is respectfully submitted, cannot now file a petition for the enforcement of such order.

FRANCIS I. GOWEN,
for Defendant.

April 8, 1916.

ORDER OF COURT.
Filed April 10, 1916.

And now, to wit, this 10th day of April, 1916, Amendment to Petition allowed, exception noted for defendant.

BY THE COURT.

DICKINSON, *J.*

SUR AMENDED PETITION.

PLEAS.
Filed April 14, 1916.

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1. The defendant pleads "Not Guilty".

2. And for a further plea the defendant says that the plaintiff is not entitled to maintain the present proceeding because it says that the order of the Interstate Commerce Commission for the enforcement of which the present proceeding has been instituted was made on March 11, 1912, and by the Act of Congress under which said order was made it is provided that a petition for the enforcement of an order of the character of that for the enforcement of which the present proceeding is brought shall be filed in the Circuit Court

within one year from the date of the order and not after the expiration of such year, and the defendant avers that the petition in the present case for the enforcement of the order making the award in favor of the plaintiff, the amount of which it is seeking to recover, was not filed in this Court within one year from the date of the order, as will appear by an inspection of the Record.

FRANCIS I. GOWEN,
JOHN G. JOHNSON,
for Deft.

(For Bill of Exceptions, see page 65 of the Record in the case of James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company.)

(For Opinion refusing motion for new trial, see page 320 of the Record in the case of James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company.)

(For Supplemental Opinion, see page 327 of the Record in the case of James H. Minds, surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company.)

MOTION FOR JUDGMENT UPON THE VERDICT.

Filed Nov. 10, 1916.

AND NOW, to wit, this Tenth day of November, 1916, it is moved that judgment upon the verdict in the above case be entered in favor of the plaintiff and against the defendant.

H. W. MOORE,
JOHN H. MINDS,
Attorneys for Plaintiff.

JUDGMENT.
Filed Nov. 10, 1916.

Before DICKINSON, *J.*

AND NOW, to wit, this 10th day of November, 1916, in accordance with praecipe filed, judgment is hereby entered on the verdict in the above entitled case in favor of the plaintiffs and against the defendant in the sum of Thirty-three thousand, six hundred eighteen and 37-100 ($33,618.37) Dollars.

BY THE COURT.

Attest:

LEO A. LILLY,
Deputy Clerk.

OPINION.
Filed Nov. 10, 1916.

SUR MOTION FOR ALLOWANCE OF ATTORNEY'S FEE.

DICKINSON, *J.*

For the reasons expressed in the opinion filed in James H. Minds et al. vs. Pennsylvania Railroad Company, December Sessions 1912, No. 2422, we allow and tax as a reasonable counsel fee in this case the sum of Six Thousand Seven Hundred and Fifty Dollars ($6750.00) to be collected as part of the costs.

Exception allowed to defendant.

BY THE COURT.

DICKINSON, *J.*

PETITION FOR WRIT OF ERROR.
Filed Nov. 14, 1916.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

AND NOW, November, 14, 1916, comes The Pennsylvania Railroad Company, defendant herein, and says that on or about the 10th day of November, 1916, the said Court entered judgment in favor of the plaintiff and against the defendant, in which judgment and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignments of error filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Third Circuit for the correction of errors so complained of, and that the transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

HENRY WOLF BIKLE,
FRANCIS I. GOWEN,
H. W. B.
Attorneys for Defendant.

ASSIGNMENTS OF ERROR.
Filed Nov. 14, 1916.

AND NOW, The Pennsylvania Railroad Company, defendant in this cause, filed with its petition for a writ of error, the following assignments of error, upon which it will rely upon its appeal from the judgment in this court entered in this cause, and which appear in the record and proceedings in this cause.

I.

The learned trial Judge erred in entering the order made by him on the tenth day of April, 1916, granting leave to the plaintiff to amend the original petition filed in this case, the effect of the amendment thus allowed being to enable the plaintiff to assert a cause of action based upon an order of the Interstate Commerce Commission other than the order on which suit had originally been brought, which substituted order had been made by the Interstate Commerce Commission more than a year prior to the date of the allowance of the amendment.

II.

The learned trial Judge erred in charging the jury as follows:

> "Now, gentlemen, there is another question in this case, and that is this: There is a dispute as to the tonnage between these parties to this extent, and that bears also upon this question of cost, and the defendant presents to you this view of it: They figure up—and I will only give you the round figures instead of going into the actual figures, because they are somewhat confusing, but it will give you the idea—the defendant presents this view of it, that the actual total cost of the tonnage which was put out amounted in round figures to $136,000. If the increased tonnage could have been put out at 88 cents, then the total cost instead of being $136,000 would have been only $105,000. The defendant, therefore, presents that view to you.
>
> "Let me see if I can make it clearer by a simpler illustration, and taking small figures, because these large figures are a little confusing. Suppose a man is manufacturing or producing anything, and his total cost for producing it is $123. Now, you inquire how many units of product he has put out, how many anything, no matter what it is, and

you find out he has put one hundred. Now, $123, that it has cost him, divided by one hundred, would give $1.23 per unit, when it has cost him $123 in the aggregate. Now, suppose you increase his units to one hundred and twenty, and you find that according to his calculation that his aggregate cost instead of increasing, as you would naturally expect it to do, in accordance with the increased output, or if it did not increase it would be difficult to understand how it would decrease—and you find that his aggregate cost instead of being $123 has been cut down to $105. You say, 'How can that be? I can easily understand that if a man spends $123 to put out one hundred things his unit cost is $1.23 for each one. That is clear enough. If he only puts out fifty, then his cost for each one is double that. If he puts out two hundred at the same cost, then his cost per unit is half of the $1.23. That is clear enough. But if it costs a man $123 to put out one hundred, how can he possibly put out one hundred and twenty for $105?' Your conclusions would be that there was something wrong in the calculation of unit cost. You must have it too low. That is the question for you to determine in this case, because it bears upon both the aggregates of this claim, and bears upon the unit cost, and therefore we have the testimony which has been adduced before you to show that there is an inaccuracy in the claim presented by the plaintiff in that respect. Of course, gentlemen, while as a mathematical proposition that is obviously true, and that mathematically speaking it would be absurd for a man to say that he could produce one hundred things for $123 but if he increased his output to one hundred and twenty, produced twenty more of the same things in the same way, he would cut down his aggregate cost from $123 to $105. But you are to consider the argument addressed to you by coun-

sel upon the other side, and their explanation of that phenomenon. I do not pretend to present all of it to you, but just enough to give you an illustration. Take a man who is shipping coal, for instance, and all his cars come to him in a regular way at the times at which he may employ his men right at once in filling them, getting them out of the way, bringing empties in and filling them and getting them out of the way the result would be that he could get them out at a unit cost of a certain amount per ton, but if he had the men there and their wages going on and all the other expenses going on, and they were standing there idle doing nothing for an hour or two hours or three hours, or there were breaks and interruptions in the continuity of his work in the one case, then it would be easily understood that under one condition of work it might cost the man $123 to get out one hundred tons, and under the other more favorable conditions of work he might be able to get out one hundred and twenty tons at an aggregate cost of $105."

III.

The learned trial Judge erred in charging the jury as follows:

"In other words, you find the damages as you think they were on June 28th, 1907, and then you add to it such sum as in your judgment will make the money received now the equivalent of that received on June 28th, 1907. That must not exceed six per cent. interest."

IV.

The learned trial Judge erred in that his charge to the jury was inadequate in failing to call to the attention of the jury the evidence introduced by the defendant tending to establish the number of cars to

which the plaintiffs were entitled under the rule of distribution prescribed by the Interstate Commerce Commission.

V.

The learned trial Judge erred in that his charge to the jury was inadequate in failing to call to the attention of the jury the method which must be pursued in determining the number of cars to which the plaintiff was entitled under the rule of distribution prescribed by the Interstate Commerce Commission.

VI.

The learned trial Judge erred in refusing to affirm the third point submitted by the defendant, as follows:

> "3. The Interstate Commerce Commission ascertained the number of cars which the plaintiffs, in the judgment of the Commission, should have received in the period of the action with reference to a rule of distribution promulgated by the Commission after the close of the period of the action. The Commission had no power to make its rule of distribution retroactive, and hence its conclusion or finding as to the number of cars that the plaintiffs should have received, and its award of damages based thereon are invalid and afford no basis for a recovery in the present case."

VII.

The learned trial Judge erred in refusing to affirm the fourth point submitted by the defendant, as follows:

> "4. In determining the number of cars to which the plaintiffs were entitled the Interstate Commerce Commission was not at liberty to disregard the rule of distribution which it had itself promulgated, but was required to ascertain such number in accordance with this rule."

VIII.

The learned trial Judge erred in refusing to affirm the fifth point submitted by the defendant, as follows:

"5. Under the rule of distribution prescribed by the Interstate Commerce Commission the plaintiffs were not entitled in the period of the action to any individual cars belonging to other shippers or to any fuel cars either of the defendant or of any other railroad company if these were consigned to other mines. The plaintiffs were entitled to their own individual cars and to their just and proper share of the cars which the defendant had available for distribution among shippers."

IX.

The learned trial Judge erred in refusing to affirm the sixth point submitted by the defendant, as follows:

"6. If the testimony has satisfied the jury that the Interstate Commerce Commission in arriving at the number of cars which the plaintiffs should have received ascertained this number by treating as justly allotable to them the percentage which their mine rating entitled them to of the aggregate of all the cars which were placed by the defendant at the mines in the region in which the plaintiff's mine was located, regardless of the consideration that there were included in this aggregate a large number of individual cars belonging to other shippers, and fuel cars of the defendant and of other railroad companies, which had been placed at other mines, the method adopted by the Commission for ascertaining the number of cars which the plaintiffs should have received was not in accordance with its own rule and was consequently erroneous, and the finding or conclusion of the Commission as to the number which the plaintiffs should have received was therefore invalid and affords no basis for a recovery in the present action."

X.

The learned trial Judge erred in refusing to affirm the seventh point submitted by the defendant, as follows:

"7. It appears from the evidence that in arriving at the number of additional cars which, in its judgment, the plaintiffs should have received, the Interstate Commerce Commission failed to give effect in certain periods to the rule of the defendant in force at the time and approved by the Commission by which cars placed at mines were counted as part of the mine's quota on each day on which they were available for shipments. This rule was a lawful and proper one, and the Commission was not justified in ignoring or disregarding it."

XI.

The learned trial Judge erred in refusing to affirm the defendant's eighth point, as follows:

"8. The defendant has submitted a statement prepared by a public accountant, purporting to show the number of cars which the plaintiffs would have received if distribution had been made by the defendant in accordance with the rule of the Intrstate Commerce Commission. It appears from this statement that the additional cars to which they would have been entitled would not have exceeded 739 cars. Treating each car as having a capacity of thirty-five tons, the tonnage which could have been transported in these cars would have been 25,865 tons, and this tonnage should be accepted by the jury as representing that which the plaintiffs should have received cars for the shipment of, if the jury believe that the statement prepared by the accountant correctly shows the number of cars which, under the Commission's rule of distribution, plaintiffs were entitled to receive in addition to those which were actually delivered to them."

XII.

The learned trial Judge erred in refusing to affirm the eleventh point submitted by the defendant, as follows:

"11. The evidence adduced upon behalf of the defendant has shown that if the plaintiffs had mined any additional tons in the period of the action, they would have been obliged to pay or expend for each ton the miners' wages, which would have been 63 cents a ton, and the royalty on the coal mined, which would have been not less than ten cents a ton, and that if they had mined 71,257 tons, there would have been additional expenses of 7 cents per ton on account of ventilation and supplies, and 6 cents per ton on account of transportation, making a total additional expense of 86 cents per ton. If the jury believe this testimony as to this additional cost, the cost per ton of the coal mined, including these 71,257 additional tons, would have been $1.00."

XIII.

The learned trial Judge erred in refusing to affirm the twelfth point submitted by the defendant, as follows:

"12. The evidence has shown that if the plaintiffs had mined any additional tons in the period of the action, they would have been obliged to pay or expend for each ton, the miners' wages, which would have been 63 cents a ton, and the royalty on the coal mined, which would have been not less than 10 cents a ton. The additional cost that the plaintiffs would have been subjected to, therefore, had they mined any additional tonnage would have been not less than 73 cents per ton. If the jury believe this testimony as to this additional cost, and there is nothing to contradict it, the cost per ton if 25,865 tons had been mined would have been $1.026."

XIV.

The learned trial Judge erred in refusing to affirm the sixteenth point submitted by the defendant, as follows:

"16. The plaintiffs are not entitled to recover interest on the amount of the award from June 28th, 1907, to the date on which the award was made."

XV.

The learned trial Judge erred in refusing to affirm the seventeenth point submitted by the defendant, as follows:

"17. The plaintiffs are not entitled to recover interest on the amount of the award from the date on which the award was made."

XVI.

The learned trial Judge erred in refusing to affirm the eighteenth point submitted by the defendant, as follows:

"18. Under the law and the evidence the plaintiffs are not entitled to recover and your verdict should be for the defendant."

XVII.

The learned trial Judge erred in entering judgment in favor of the plaintiffs against the defendant upon the verdict of the jury.

XVIII.

The learned trial Judge erred in allowing a counsel fee of $6750.00, since such counsel fee was excessive.

XIX.

The learned trial Judge erred in allowing a counsel fee of $6750.00, since such fee was made with refer-

ence to services of counsel before the Interstate Commerce Commission as well as in connection with the institution and prosecution of the present action in the District Court.

XX.

The learned trial Judge erred in allowing a counsel fee of $6750.00, since such fee was not restricted to the services of counsel rendered in connection with the initiation and prosecution of the case in the District Court.

HENRY WOLF BIKLE,
FRANCIS I. GOWEN,
Attorneys for Defendant.

PRAECIPE SUR TRANSCRIPT OF RECORD.
Filed Nov. 15, 1916.

To the Clerk of the U. S. District Court, E. D. of Pa.:

In making up the transcript of record in the above entitled case you are to include the following:

Docket entries,
Writ of Error,
Petition,
Demurrer to Petition,
Plea,
Memorandum as to Petition to amend original petition,
Answer of Penna. R. R. Co. to Petition to amend Petition,
Order of Court granting leave to amend original Petition,
Pleas to Amended Petition,
Memorandum as to Bill of Exceptions,
" " " Opinion,
" " " Supplemental Opinion,

Praecipe for Judgment—Judgment,
" " " Opinion Sur counsel fees,
Petition for allowance of Writ of Error,
Assignments of Error,
Clerk's Certificate,

and no others.

HENRY WOLF BIKLE,
FRANCIS I. GOWEN,
Attys. for Plff-in-Error.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA. } *sct.*

I, WILLIAM W. CRAIG, Clerk of the District Court of the United States for the Eastern District of Pennsylvania, do hereby certify, that the annexed and foregoing is a true and faithful copy of so much of the Pleas and Proceedings in the case of James H. Minds and Julia A. Matz, trading as Bulah Coal Company, No. 2424 Dec. Sess., 1912, as per praecipe of counsel filed, a copy of which is hereto annexed the transcript of record is to include and now remaining among the records of the said court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said District Court at Philadelphia, (Seal) this 29th day of November, in the year of our Lord one thousand, nine hundred and sixteen, and in the one hundred and forty-first year of the Independence of the United States.

WILLIAM W. CRAIG,
Clerk District Court U. S.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2195 (List No. 17).

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES H. MINDS and JULIA A. MATZ, Co-partners, Trading as BULAH COAL COMPANY, Defendants in Error.

And afterwards, to wit, on the 30th day of April, 1917, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Joseph Buffington, Hon. John B. McPherson and Hon. Victor B. Woolley, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 19th day of July, 1917, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

In the United States Circuit Court of Appeals for the Third Circuit. March Term, 1917.

No. 2194.

PENNA. RAILROAD CO.

vs.

JAMES H. MINDS, Surviving Partner, &c., Lately Trading as BULAH COAL CO., Plaintiff Below.

March Term, 1917.

No. 2195.

PENNA. RAILROAD CO.

vs.

JAMES H. MINDS and JULIA A. MATZ, Trading as BULAH COAL CO., Plaintiffs Below.

Error to the District Court of the United States for the Eastern District of Pennsylvania.

Before Buffington, McPherson and Woolley, Circuit Judges.

McPHERSON, *Circuit Judge:*

In these cases the plaintiffs filed petitions in the district court to enforce orders of reparation made by the Interstate Commerce Com-

mission (23 I. C. C., 192); the orders being based on the Railroad's discrimination against the Bulah Coal Co. in the distribution of cars: 20 I. C. C., 52. Two periods are involved, one (No. 2194), from July 1, 1902, to October 1, 1904, and the second (No. 2195), from Oct. 1, 1904, to June 30, 1907. The cases were tried together, but separate verdicts and judgments were entered, in No. 2194 for $16,092.92, and in No. 2195 for $33,617.37.

During the first period James H. Minds and William J. Matz, a partnership known as the Bulah Coal Co., leased and operated a bituminous coal mine known as Webster No. 4, situated on the Tyrone Division of the Railroad's system in the Clearfield district of Pennsylvania. The mine had no other outlet to market. Matz died in April, 1904, and Minds continued the operation as surviving partner until October 1. On that date, a new partnership bearing the same name, composed of Minds and Julia A. Matz, the widow, executrix, and sole legatee of William J. Matz, took over the mine and went on with the business until June 30, 1907. During the 5 years in question, whenever the Railroad's available supply of cars was not large enough to carry the aggregate production of the district, the cars were allotted to the mines on a percentage basis, this percentage being determined in accordance with the Railroad's rule.

The Coal Co. objected to the rule as unfair and discriminatory, and in June 1907 attacked it before the Commission. Two proceedings were brought, the first by Minds as surviving partner, covering the first period: the claim was for about $80,000 damages, and in March 1912 a reparation order was entered for about $18,600 with interest from June 28, 1907. The second proceeding was by Minds and Julia Matz, trading as the Bulah Coal Co., and covered the second period; the claim was for about $75,000 damages and the order, also entered in March 1912, was for about $31,700, with interest from June 28, 1907. Neither award was paid, and on each a separate action was brought. By mistake the awards were confused, so that Minds as surviving partner sued on the order entered in favor of Minds and Julia Matz, while Minds and Julia Matz sued on the order entered in favor of Minds as surviving partner. This was an obvious blunder, and on April 10, 1916, the district court allowed the orders to be transposed, the Railroad objecting, then and now, on the ground that such an amendment could not be granted after one year from the date of the orders. As we understand, however, this position is not much relied on, and in any event we see no reason to say anything about it except to approve the action of the district court in setting right what was a plain and harmless mistake. Its correction did the Railroad no possible injury.

In passing on the Coal Co.'s complaints, the Commission decided that the Railroad's rule was wrong, and had resulted in discrimination; and then announced the correct rule, which showed that the Coal Co. had not received its proper quota. The Railroad contends that the Commission has not disclosed the basis on which the rule rests, but has merely stated in effect that the Coal Co. could, and

would, have mined and shipped certain additional tonnage, if its share of cars had been received. This contention is not correct as a reading of the Commission's full reports on this subject will show; Ohio R. R. Com. v. Hocking Valley Ry., 12 I. C. C., 398; Traer v. Chic. & Alt. R. R., 13 I. C. C., 451; Hillsdale Co. vs. Pa. R. R., 19 I. C. C., 356; Minds vs. Pa. R. R., 20 I. C. C., 52.

The basis of the Commission's orders is certain findings of fact concerning the capacity at which the mine should be rated; the number of working days that should constitute an average working month; the number of additional tons that the Coal Co. could and would have mined, sold, and shipped, during the whole 5 years, if the mine had received its proper share of cars; the amount of profit that would have been made on the estimated additional tonnage; the actual cost of mining per ton; and the estimated cost if the mine had received its proper share of cars. In the district court, the Coal Co. offered the evidence of several witnesses in addition to the findings and orders. The Railroad did not, and does not, dispute the findings except in two particulars; (*a*) It denies that the Coal Co. could have mined coal at a cost of 88 cents per ton, even if the proper share of cars had been furnished; and (*b*) It disputes the estimate of additional tonnage that the Coal Co. would have mined and shipped during the second period, if such share had been received.

As to the first particular, the Railroad insists, that the Coal Co. could not possibly escape two items of cost, namely, the mine rate of wages and the royalty, and that, even if nothing else than these items were charged against the additional tonnage, the cost of mining both the coal that was actually brought to the surface, and the estimated additional coal, would necessarily have been more than 88 cents, the cost found by the Commission. And, in further reference to the cost of mining during the second period, the Railroad insists that the inevitable cost would have embraced two other items in addition to the mine rate of wages and the royalty. To the Railroad's evidence concerning this first particular, the Coal Co. offered some evidence in reply, and thereupon the Railroad asked for instructions whose refusal is assigned for error.

The other particular referred to relates to the second period only. The Railroad contends, that when the Commission estimated the additional tonnage that could and would have been mined and shipped if the Coal Co. had received its proper share of cars, they disregarded their own rule of distribution. This contention bears directly upon the present controversy, because the amount of the Coal Co.'s damage depends largely on the number of cars it should have received. It would have made profits if it had been able to ship, and it could have shipped if it had received the cars, so that the Railroad's failure to furnish the cars bears directly on the question of damage. The Railroad's argument is, that in substance the Commission's rule provides as follows: The capacity of each mine in the district is to be rated by adding the tons it could produce (its physical capacity), and the average number of tons it could sell (its commercial capacity), and dividing the sum by two—the capacity or rating thus

ascertained being the basis on which cars are to be apportioned during percentage periods. The first step in determining the number of cars to be allotted to each mine during such periods is to determine the proportion that would normally go to the mine. This is obtained by taking the aggregate ratings of all the mines in the district and fixing the proportion that each rating bears to the aggregate. The next step is to determine how many cars are available, and in so doing all the cars in the four classes described below are to be put into one pool. Whenever there are cars enough to carry all the coal produced, no question of diminishing the number for each mine arises; but during percentage periods the question does arise continually, for under the Commission's rule the three classes of "assigned" cars must first be allotted to the mines that have a prior right thereto, and this allotment inevitably compels a readjustment of the "unassigned" or "system" cars that each mine is to receive. There are 4 classes of coal cars; (1) individual or private cars, owned or leased by a shipper, (2) cars intended to carry fuel for the Penna. Railroad itself, (3) cars sent by foreign railroads intended to carry their own fuel supply, and (4) other cars furnished by the Railroad for general commercial use. The first three classes are "assigned" cars, and the cars in the fourth class are "Unassigned" or "system" cars. The rule requires that the assigned cars shall first be given to such mines as may be designated either by the owners or lessees of the private cars, or by the respective railroads; and requires that these 3 classes shall be thus allotted in the first instance, without regarding the number of cars to which the particular mine might be entitled if its rating alone were considered—the result being,—that when the system cars come to be distributed, they cannot be properly allotted without first taking into account the previous allotment of the assigned cars. For example; if a mine has already received assigned cars, these must be counted against the share to which its rating (if taken alone) would entitle it, so that, if the assigned cars already received equal or exceed the mine's share estimated according to its rating alone, it receives none of the system cars; while on the other hand, if the assigned cars already received are fewer than its rating (if considered alone) would entitle it to receive, the mine does receive some of the system cars, but only so many as will bring the total number up to the rating. On this point, the Railroad contends, that the Commission undoubtedly disregarded its own rule in estimating the additional tonnage that would have been mined and shipped by the Coal Co. during the second period, and has ascertained such tonnage by a different and incorrect method.

The Railroad complains also about the damages recovered as interest by the plaintiffs, its position being this: Minds as surviving partner claimed about $80,000, and was awarded only about $18,600; Minds and Julia Matz claimed about $75,000, and were awarded only about $31,700; each sum to bear interest from June 28, 1907. The Railroad objects to the Commission's allowance of interest, and also to any allowance of interest in the district court, on the ground that the findings and orders of the Commission and the evidence offered

at the trial show clearly that the plaintiffs' demands were grossly and unfairly inflated.

Finally, after the trial, counsel fees were asked for and allowed; and these are now objected to as excessive, and also as without legal warrant, the second objection being put on the ground that the fees should have been confined to the services of counsel in connection with the suits in the district court.

(1) The Railroad complains, but we think without sufficient warrant, that the trial judge erred in what he said to the jury in submitting the question, how much the cost of mining would have been if the plaintiffs had received their proper share of cars. We think his instructions were sufficient, and see no occasion to discuss them. Moreover, on this subject the evidence was conflicting, and, since the credibility of opposing testimony was involved, the Railroad was not entitled to binding instructions. The verdict on this point must be accepted as final.

(2) The next matter concerns the second period only, and presents the objection on which the Railroad seems to lay most weight, namely, that in making the orders of reparation the Commission followed, not its own, but another, rule of distribution. In this respect the Railroad contends that the situation is very much like the situation in Railroad vs. Jacoby, 242 U. S., —, and indeed is controlled by that decision. In our opinion, an important difference exists for the following reasons:

Before the Commission the Jacoby case and the case now in hand were considered in the same group, and both cases attacked the Railroad's rule of distribution on the ground of discrimination. When the Jacoby case came to be tried in the district court, the plaintiff offered no other evidence than the Commission's order, whereupon the Railroad offered tables showing in detail that during the period then in question certain favored companies had received cars amounting to 59.9 and 59.6 per cent. of their ratings. Jacoby had received a much smaller percentage, and the relevancy of the tables was, not so much to prove the discrimination as to show in connection with other evidence that the Commission had calculated Jacoby's damages by using precisely the same percentages, and had thus permitted recovery (as the Supreme Court said):

"* * * not upon the basis of damages sustained by reason of the illegal discrimination practiced against the plaintiffs as found by the Commission, but upon the basis that (Jacoby was) entitled to receive cars equal in ratio to those illegally and preferentially given to the certain favored companies named in the tables. The effect of the enforcement of such rule, would be, not to give the shipper the damages which he actually suffered, but would base the recovery upon a rule which is condemned as to others, because of its discrimination in their favor,—a result manifestly not intended by the act of Congress."

In the district court Jacoby recovered the amount thus improperly awarded by the Commission, with interest thereon, and the Supreme Court held that such a result was wrong; and that the jury

should have been instructed, that, if the Commission's award was in fact based on the proposition that Jacoby also was entitled to cars amounting to 59.9 and 59.6 per cent., the award was erroneous and the plaintiff should not have recovered. The supreme court said:

"It is urged that the testimony before the Commission is not all in the record, and that for aught that appears the Commission may have reached its conclusion and awarded damages upon other and competent proofs, and it is insisted that the coincidence of the amount as awarded and the amount ascertained by the use of the percentages contained in the tables may not necessarily have controlled the action of the Commission. But it is difficult to reach the conclusion that the Commission could have arrived at the result so exactly corresponding with the one obtained by the use of the percentage, shown in the tables, except by actually using them to ascertain the sum which is exactly the amounts resulting from their application. The Commission might have approximated the same result by using other and legal means to ascertain the damages sustained, but when it is demonstrated that the use of the percentages precisely produces the amount awarded to the dollar and cent, it seems almost mathematically certain that the result could have been reached in no other way. At least, we think that the testimony was in such shape that, as we have already said, the Company was entitled to the specific request upon this subject submitting the matter to the jury."

In some respects the case now in hand is like Jacoby's case, but it differs in what we regard as a material particular. Laying aside the fact that the present plaintiffs offered other evidence than the Commission's findings and orders, we think it important to observe that the principal of each verdict is for a sum considerably less than the principal of the Commission's award, so that the recovery here does not rest on the award alone, but is undoubtedly based on all the evidence touching the subject of the plaintiffs' damage. As an award by the Commission is only prima facie evidence of the amount of damage, it follows that on the trial in the district court the Railroad may attack the amount, and if the evidence show that the award is incorrect the jury should follow the evidence and reject the award. We do not decide the question, whether a plaintiff can recover more than the Commission awards, but undoubtedly the Railroad may prove that the sum is too large. As the verdicts here demonstrate, the jury did not follow the orders of the commission. and it seems to us therefore, that, even if the awards be calculated on the wrong theory, the plaintiffs have not recovered on this heory, but on other evidence, and are not to be charged with the Commission's possible mistake. In the Jacoby case the jury repeated the Commission's mistake precisely, and in this respect the case before us appears to be materially different, for the jury here has rejected the Commission's calculation, and has reached a different result.

We have considered the Railroad's position at some length in order to present it to the Supreme Court if the case should be re-

viewed by that tribunal, but in our opinion the question is not before us on this record for the following reason: The district judge gave to the jury a clear and painstaking explanation of the questions submi ted, and in general terms he instructed them about the proper method of distributing cars; but, no doubt by inadvertence (as he himself has stated in 237 Fed. on page 272), he did not call their attention in detail to some of the evidence, particularly to a table or blue print that was regarded by the Railroad as of much importance. Some of the Railroad's requests for charge were based on this table, and indeed the argument of counsel in this court rested in large measure thereon. At the end of the charge the trial judge said:

"I think I have gone over the subject-ma'ter of all of the different points submitted to me. So far as they are affirmed in the general charge they are affirmed, and so far as not affirmed in the general charge they are disaffirmed, and counsel if they choose may call my attention to any specific point which they would like to have specifically answered."

This was a plain request to counsel to call his attention to any omission, and in fairness to him should have been then complied with. But he was not asked to answer specifically any of the Railroad's points. On the contrary, counsel replied as follows:

"In the first period we do not dispute the lost tonnage nor the cost. In the second period we dispute the correctness both of plaintiff's cost figures and also the tonnage. We ask that the court so charge."

The court immediately complied with this request, whereupon each party sent out its own calculation and the amount due in order to save the jury from labor. As it seems to us, the Railroad should not now be allowed to complain, as it does complain by several assignments of error, that some of its requests for instruction were not given. The situation is dealt with so well in Thompson v. Lumber Co., 55 Pa. Super. 327, that we content ourselves by repeating what was said in that case by President Judge Rice:

"The charge as a whole was a clear, comprehensive, and impartial presentation of the issues of fact to be decided, and if there was omission to call attention to, or comment upon as fully as might be deemed desirable, specific facts or phases of the evidence, it was an inadvertency, which, if the judge's attention had been called to it, doubtless would have been corrected. The decisions are numerous, and are founded on just principles essential to the avoidance of undue expense and delay in the adjudication of cases, that inadvertent mistakes or omissions in reviewing the testimony should be called to the attention of the court before the case goes to the jury, so that the error, if there is one, may be corrected before it has done any harm. As to such inadvertent omission or mistake, it has been said, and we think the principle is applicable to these assignments, that 'a party may not sit silent and take

his chance of a verdict, and then if it is adverse complain of a matter which, if an error, would have been immediately rectified and made harmless.' Com. v. Razmus, 210 Pa. 609; Com. v. Minney, 216 Pa. 149; Medis v. Bentley, 216 Pa. 324; Slavin v. Northern Cambria Street Railway Co., 47 Pa., Superior Ct. 454; Com. v. Eaby, 52 Superior Ct. 619."

(3) With regard to the allowance of damages for delay in the form of interest, we find no error to correct. Altho such an allowance in actions of tort is not a matter of right, it is nevertheless permissible and often forms part of a verdict. On the facts of this case we cannot say that no allowance should have been made: the only ground of the objection is the difference between the amount originally claimed before the Commission and the amount finally adjudged to be due, and this difference is not of itself sufficient to require us to decide as a ma ter of law that the plaintiff's original claims were unduly inflated or made in bad faith. Besides, if the subject should be within our power on this record, the amount of this allowance, whether by the commission or by the jury, does not seem to us excessive, and we see no reason on this account to interfere with the verdict.

(4) As to the award of counsel fees, we are similarly uncertain. We accept the statement of the trial judge that he confined himself to compensation for services in the district court, and, as we do not know what facts he had before him, we are unable to say that any abuse of discretion appears from the mere amount of his award.

In each case the judgment is affirmed.

Endorsed: No. 2195. Opinion of the Court by McPherson, J. Received and filed July 19, 1917. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2195 (List No. 17).

PENNA. RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES H. MINDS, etc., Defendant in Error.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by

this Court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs.

(Signed) JOHN B. McPHERSON,
Circuit Judge.

Philadelphia, July 19, 1917.

Endorsed: No. 2195. Order Affirming Judgment. Received and filed July 19, 1917. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2195.

PENNSYLVANIA RAILROAD CO., Plaintiff in Error,

vs.

JAMES H. MINDS, etc., Defendant in Error.

And afterwards, to wit, on the seventeenth day of September, 1917, a petition for re-argument or modification of the Court's opinion was duly filed, whereupon the Court made the following order:

And now, to wit, October 8, 1917, after due consideration, the petition for re-argument or modification of the court's opinion in the above-entitled case is hereby refused.

(Signed) PER CURIAM.

Received and filed Oct. 8, 1917. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2195.

THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES H. MINDS and JULIA A. MATZ, Copartners, Trading as BULAH COAL COMPANY, Defendants in Error.

Specifications of Error.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

Now comes the plaintiff in error, The Pennsylvania Railroad Company, by Henry Wolf Bikle and Francis I. Gowen, its Attorneys, and says that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Third Circuit in the above

entitled cause, and in the rendition of the final judgment therein, manifest error has intervened to the prejudice of said plaintiff in error in this, to wit:

1. The said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania for thirty-three thousand six hundred and eighteen Dollars and thirty-seven cents ($33,618.37), and costs of suit, entered on the 10th day of November, A. D. 1916, in favor of said defendants in error and against said plaintiff in error.

2. The said Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court for the Eastern District of Pennsylvania and in not remanding the said cause to the said District Court for a new trial.

3. The said Circuit Court of Appeals erred in not sustaining the first assignment of error in the said cause, which assignment was as follows:

"I. The learned trial Judge erred in entering the order made by him on the tenth day of April, 1916, granting leave to the plaintiff to amend the original petition filed in this case, the effect of the amendment thus allowed being to enable the plaintiff to assert a cause of action based upon an order of the Interstate Commerce Commission other than the order on which suit had originally been brought, which substituted order had been made by the Interstate Commerce Commission more than a year prior to the date of the allowance of the amendment."

4. The said Circuit Court of Appeals erred in not sustaining the second assignment of error in the said cause, which assignment was as follows:

"II. The learned trial Judge erred in charging the jury as follows:

'Now, gentlemen, there is another question in this case, and that is this: There is a dispute as to the tonnage between these parties to this extent, and that bears also upon this question of cost, and the defendant presents to you this view of it: They figure up—and I will only give you the round figures instead of going into the actual figures, because they are somewhat confusing, but it will give you the idea—the defendant presents this view of it, that the actual total cost of the tonnage which was put out amounted in round figures to $136,000. If the increased tonnage could have been put out at 88 cents, then the total cost instead of being $136,000 would have been only $105,00-. The defendant, therefore, presents that view to you. Let me see if I can make it clearer by a simpler illustration, and taking small figures, because these large figures are a little confusing. Suppose a man is manufacturing or producing anything, and his total cost for producing it is $123. Now, you inquire how many units of product he has put out, how many anything, no matter what

it is, and you find out he has put one hundred. Now, $123, that it has cost him, divided by one hundred, would give $1.23 per unit, when it has cost him $123 in the aggregate. Now, suppose you increase his units to one hundred and twenty, and you find that according to his calculation that his aggregate cost instead of increasing, as you would naturally expect it to do, in accordance with the increased output, or if it did not increase it would be difficult to understand how it would decrease—and you find that his aggregate cost instead of being $123 has been cut down to $105. You say, 'How can that be? I can easily understand that if a man spends $123. to put out one hundred things his unit cost is $1.23 for each one. That is clear enough. If he only puts out fifty, then his cost for each one is double that. If he puts out two hundred at the same cost, then his cost per unit is half of the $1.23. That is clear enough. But if it costs a man $123 to put one hundred, how can he possibly put out one hundred and twenty for $105?' Your conclusions would be that there was something wrong in the calculation of unit cost. You must have it too low. That is the question for you to determine in this case, because it bears upon both the aggregates of this claim, and bears upon the unit cost, and therefore we have the testimony which has been adduced before you to show that there is an inaccuracy in the claim presented by the plaintiff in that respect. Of course, gentlemen, while as a mathematical proposition that is obviously true, and that mathematically speaking it would be absurd for a man to say that he could produce one hundred things for $123 but if he increased his output to one hundred and twenty, produced twenty more of the same things in the same way, he would cut down his aggregate cost from $123 to $105. But you are to consider the argument addressed to you by counsel upon the other side, and their explanation of that phenomenon. I do not pretend to present all of it to you, but just enough to give you an illustration. Take a man who is shipping coal, for instance, and all his cars come to him in a regular way at the times at which he may employ his men right at once in filling them, getting them out of the way, bringing empties in and filling them and getting them out of the way the result would be that he could get them out at a unit cost of a certain amount per ton, but if he had the men there and their wages going on and all the other expenses going on, and they were standing there idle doing nothing for an hour or two hours or three hours, there were breaks and interruptions in the continuity of his work in the one case, then it would be easily understood that under one condition of work it might cost the man $123 to get out one hundred tons, and under the other more favorable conditions of work he might be able to get out one hundred and twenty tons at an aggregate cost of $105" (R. 299-301).

5. The said Circuit Court of Appeals erred in not sustaining the third assignment of error in the said cause, which assignment was as follows:

"III. The learned trial Judge erred in charging the jury as follows:—

'In other words, you find the damages as you think they were on June 28th, 1907, and then you add to it such sum as in your judgment will make the money received now the equivalent of that received on June 28th, 1907. That must not exceed six per cent. interest' " (R. 302).

6. The said Circuit Court of Appeals erred in not sustaining the sixth assignment of error in the said cause, which assignment was as follows:

"VI. The learned trial Judge erred in refusing to affirm the third point submitted by the defendant, as follows:—

'3. The Interstate Commerce Commission ascertained the number of cars which the plaintiffs, in the judgment of the Commission, should have received in the period of the action with reference to a rule of distribution promulgated by the Commission after the close of the period of the action. The Commission had no power to make its rule of distribution retroactive, and hence its conclusion or finding as to the number of cars that the plaintiffs should have received, and its award of damages based thereon are invalid and afford no basis for a recovery in the present case' " (R. 313).

7. The said Circuit Court of Appeals erred in not sustaining the seventh assignment of error in the said cause, which assignment was as follows:

"VII. The learned trial Judge erred in refusing to affirm the fourth point submitted by the defendant, as follows:

'4. In determining the number of cars to which the plaintiffs were entitled the Interstate Commerce Commission was not at liberty to disregard the rule of distribution which it had itself promulgated, but was required to ascertain such number in accordance with this rule.' " (R. 314.)

8. The said Circuit Court of Appeals erred in not sustaining the eighth assignment of error in the said cause, which assignment was as follows:

"VIII. The learned trial Judge erred in refusing to affirm the fifth point submitted by the defendant, as follows:

'5. Under the rule of distribution prescribed by the Interstate Commerce Commission the plaintiffs were not entitled in the period of the action to any individual cars belonging to other shippers or to any fuel cars either of the defendant or of any other railroad company if these were consigned to other mines. The plaintiffs were entitled to their own individual cars and to their just and proper share of the cars which the defendant had available for distribution among shippers.' (R. 314.)"

9. The said Circuit Court of Appeals erred in not sustaining the ninth assignment of error in the said cause, which assignment was as follows:

"IX. The learned trial Judge erred in refusing to affirm the sixth point submitted by the defendant as follows:

'6. If the testimony has satisfied the jury that the Interstate Commerce Commission in arriving at the number of cars which the plaintiffs should have received ascertained this number by treating as justly allotable to them the percentage which their mine rating entitled them to of the aggregate of all the cars which were placed by the defendant at the mines in the region in which the plaintiffs' mine was located, regardless of the consideration that there were included in this aggregate a large number of individual cars belonging to other shippers, and fuel cars of the defendant and of other railroad companies, which had been placed at other mines, the method adopted by the Commission for ascertaining the number of cars which the plaintiffs should have received was not in accordance with its own rule and was consequently erroneous, and the finding or conclusion of the Commission as to the number which the plaintiffs should have received was therefore invalid and affords no basis for a recovery in the present action.' (R. 314.)"

10. The said Circuit Court of Appeals erred in not sustaining the tenth assignment of error in the said cause, which assignment was as follows:

"X. The learned trial Judge erred in refusing to affirm the seventh point submitted by the defendant, as follows:

'7. It appears from the evidence that in arriving at the number of additional cars which, in its judgment, the plaintiffs should have received, the Interstate Commerce Commission failed to give effect in certain periods to the rule of the defendant in force at the time and approved by the Commission by which cars placed at mines were counted as part of the mine's quota on each day on which they were available for shipments. This rule was a lawful and proper one, and the Commission was not justified in ignoring or disregarding it.' (R. 315.)"

11. The said Circuit Court of Appeals erred in not sustaining the eleventh assignment of error in the said cause, which assignment was as follows:

"XI. The learned trial Judge erred in refusing to affirm the defendant's eighth point as *follows:*

'8. The defendant has submitted a statement prepared by a public accountant, purporting to show the number of cars which the plaintiffs would have received if distribution had been made by the defendant in accordance with the rule of the Interstate Commerce Commission. It appears from this statement that the additional cars to which they would have been entitled would not have exceeded 739 cars. Treating each car as having a capacity of thirty-five tons, the tonnage which could have been transported in these cars would have been 25,865 tons, and this tonnage should be accepted by the jury as representing that which the plaintiffs should have received cars for the shipment of, if the jury believe that the statement prepared by the accountant correctly shows the number of cars which, under the Commission's rule of distribution, plaintiffs were entitled to re-

ceive in addition to those which were actually delivered to them." (R. 315.)

12. The said Circuit Court of Appeals erred in not sustaining the twelfth assignment of error in the said cause, which assignment was as follows:

"XII. The learned trial Judge erred in refusing to affirm the eleventh point submitted by the defendant, as follows:

'11. The evidence adduced upon behalf of the defendant has shown that if the plaintiffs had mined any additional tons in the period of the action, they would have been obliged to pay or expend for each ton, the miners' wages, which would have been 63 cents a ton, and the royalty on the coal mined, which would have been not less than ten cents a ton, and that if they had mined 71,257 tons, there would have been additional expenses of 7 cents per ton on account of ventilation and supplies, and 6 cents per ton on account of transporation, making a total additional expense of 86 cents per ton. If the jury believe this testimony as to this additional cost, the cost per ton of the coal mined including these 71,257 additional tons, would have been $1.00.' (R. 316.)"

13. The said Circuit Court of Appeals erred in not sustaining the thirteenth assignment of error in the said cause, which assignment was as follows:

"XIII. The learned trial Judge erred in refusing to affirm the twelfth point submitted by the defendant, as follows:

'12. The evidence has shown that if the plaintiffs had mined any additional tons in the period of the action, they would have been obliged to pay or expend for each ton, the miners' wages, which would have been 63 cents a ton, and the royalty on the coal mined which would have been not less than 10 cents a ton. The additional cost that the plaintiffs would have been subjected to, therefore, had they mined any additional tonnage would have been not less than 73 cents per ton. If the jury believe this testimony as to this additional cost, and there is nothing to contradict it, the cost per ton if 25,865 tons had been mined would have been $1,026.' (R. 316.)"

14. The said Circuit Court of Appeals erred in not sustaining the fourteenth assignment of error in the said cause, which assignment was as follows:

"XIV. The learned trial Judge erred in refusing to affirm the sixteenth point submitted by the defendant, as follows:

'16. The plaintiffs are not entitled to recover interest on the amount of the award from June 28th, 1907, to the date on which the award was made.' (R. 317.)"

15. The said Circuit Court of Appeals erred in not sustaining the fifteenth assignment of error in the said cause, which assignment was as follows:

"XV. The learned trial Judge erred in refusing to affirm the seventeenth point submitted by the defendant, as follows:

'17. The plaintiffs are not entitled to recover interest on the amount of the award from the date on which the award was made.' (R. 318.)"

16. The said Circuit Court of Appeals erred in not sustaining the sixteenth assignment of error in the said cause, which assignment was as follows:

"XVI. The learned trial Judge erred in refusing to affirm the eighteenth point submitted by the defendant, as follows:

"18. Under the law and the evidence the plaintiffs are not entitled to recover and your verdict should be for the defendant." (R. 318.)

17. The said Circuit Court of Appeals erred in not sustaining the seventeenth assignment of error in the said cause, which assignment was as follows:

"XVII. The learned trial Judge erred in entering judgment in favor of the plaintiffs against the defendant upon the verdict of the jury."

18. The said Circuit Court of Appeals erred in not sustaining the eighteenth assignment of error in the said cause, which assignment was as follows:

"XVIII. The learned trial Judge erred in allowing a counsel fee of $6,750, since such counsel fee was excessive."

19. The said Circuit Court of Appeals erred in not sustaining the nineteenth assignment of error in the said cause, which assignment was as follows:

"XIX. The learned trial Judge erred in allowing a counsel fee of $6,750, since such a fee was made with reference to services of counsel before the Interstate Commerce Commission as well as in connection with the institution and prosecution of the present action in the District Court."

20. The said Circuit Court of Appeals erred in not sustaining the twentieth assignment of error in the said cause, which assignment was as follows:

"XX. The learned trial Judge erred in allowing a counsel fee of $6,750, since such fee was not restricted to the services of counsel rendered in connection with the initiation and prosecution of the case in the District Court."

Wherefore, the said, The Pennsylvania Railroad Company, plaintiff in error, prays that for the errors aforesaid and other errors appearing in the record of said United States Circuit Court of Appeals in the above entitled cause to the prejudice of the plaintiff in error the said judgment of the said United States Circuit Court of Appeals be reversed, annulled, and for naught esteemed, and the said cause be remanded to the United States District Court for the East-

rn District of Pennsylvania, with instructions to grant a new trial n said cause, or for such further proceedings in said cause as may be letermined upon by the Supreme Court, to the end that justice may e done in the premises.

THE PENNSYLVANIA RAILROAD COMPANY,
By HENRY WOLF BIKLE,
FRANCIS I. GOWEN,
Attorneys for Plaintiff in Error.

October 11th, 1917.

Endorsed: No. 2195. Specifications of Error. Received and filed Oct. 12, 1917. Saunders Lewis, Jr., Clerk.

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1917.

No. 2195.

THE PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES H. MINDS and JULIA A. MATZ, Co-partners, Trading as BULAH COAL COMPANY, Defendants in Error.

Petition for Writ of Error.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit.

Your petitioner, The Pennsylvania Railroad Company, Plaintiff in Error, in the above-entitled cause, respectfully shows that the above-entitled cause is now pending in this Court, and that a judgment has therein been rendered on the 19th day of July, A. D. 1917, affirming a judgment of the District Court of the United States for the Eastern District of Pennsylvania in favor of the defendants in error and against the plaintiff in error, and that the matter in controversy in said suit exceeds one thousand dollars, besides costs, and that the jurisdiction of none of the courts above mentioned is or was dependent in anywise upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different states, and that this cause does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and it is not an admiralty case, but that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error; therefore your petitioner would respectfully pray that a writ of error be allowed it in the above entitled cause directing the clerk of this Court to send the record and proceedings in said cause with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the specification

of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected according to the laws and customs of the United States.

THE PENNSYLVANIA RAILROAD COMPANY,
(Signed) By HENRY WOLF BIKLE,
FRANCIS I. GOWEN,
Its Attorneys H. W. B.

October 11, 1917.

Endorsed: Petition for Writ of Error. Received and filed Oct. 12, 1917. Saunders Lewis, Jr., Clerk.

The foregoing petition is granted and writ of error allowed as prayed for upon plaintiff's giving bond according to law in the sum of $250.

(Signed) JOHN B. McPHERSON,
Circuit Judge.

October 16, 1917.

Endorsed: No 2194. Order Allowing Writ of Error. Received and filed October 16, 1917. Saunders Lewis, Jr., Clerk.

Bond.

Know all men by these presents, That we, The Pennsylvania Railroad Company, as principal, and United States Guarantee Company, as sureties, are held and firmly bound unto James H. Minds and Julia A. Matz, trading as Bulah Coal Company, hereinafter called Obligee in the full and just sum of Two hundred and fifty dollars ($250) to be paid to the said James H. Minds and Julia A. Matz trading as Bulah Coal Company, their certain attorney, executor, administrators, or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and several-y, by these presents. Sealed with our seals and dated this 17th day of October, in the year of our Lord one thousand nine hundred and seventeen.

Whereas, lately at a session of the United States District Court for the Eastern District of Pennsylvania, in a suit depending in said court between the said James H. Minds and Julia A. Matz, trading as Bulah Coal Company, and The Pennsylvania Railroad Company, a judgment was rendered against the said The Pennsylvania Railroad Company and in favor of the said James H. Minds and Julia A. Matz trading as Bulah Coal Company in the sum of $33,618.37, which judgment was on appeal to the United States Circuit Court of Appeals for the Third Circuit affirmed on the 19th day of July, 1917, and the said The Pennsylvania Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said James H. Minds and

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Julia A. Matz trading as Bulah Coal Company, citing and admonishing them to be and appear at the Supreme Court of the United States, to be holden at the city of Washington within thirty days.

Now the condition of the above obligation is such, That if the said the Pennsylvania Railroad Company, shall prosecute its writ of error to effect, and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in the presence of

(Seal of the Company.)

THE PENNSYLVANIA RAILROAD COMPANY,
By W. H. MYERS, [SEAL.]
Vice President.

HENRY WOLF BIKLÉ,
Witness as to P. R. R. Co.

Attest:
ROB'T H. GROFF, [SEAL.]
Ass't Secretary.

[Seal of the Company.]

UNITED STATES GUARANTEE COMPANY. [SEAL.]

[Seal of the Company.]

WILLIAM H. JACKSON,
Att'y in Fact.
EDWARD H. DE BAECKE,
Att'y in Fact.

A. THOMPSON,
Witness as to Surety.

Endorsed: No. 2195. Bond on Writ of Error for Supreme Court Received and filed Oct. 18, 1917. Saunders Lewis, Jr., Clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, sct:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this Court in the case of Pennsylvania Railroad Company, Plaintiff in Error, vs. James H. Minds, and Julia A. Matz, co-partners, trading as Bulah Coal Co., Defendants in Error, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this twenty-third

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day of October in the year of our Lord one thousand nine hundred and seventeen and of the Independence of the United States the one hundred and forty-second.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

In the United States Circuit Court of Appeals for the Third Circuit.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between the Pennsylvania Railroad Company, and James H. Minds and Julia A. Matz, co-partners, trading as Bulah Coal Company, a manifest error hath happened, to the great damage of the said Pennsylvania Railroad Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this Writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the eighteenth day of October, in the year of our Lord one thousand nine hundred and seventeen.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk United States Circuit Court of Appeals for the Third Circuit.

Allowed by—
JOHN B. McPHERSON,
Circuit Judge.

UNITED STATES OF AMERICA, *ss:*

To James H. Minds and Julia A. Matz, Co-partners, Trading as Bulah Coal Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the

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Clerk's office of the United States Circuit Court of Appeals for the Third Circuit, wherein the Pennsylvania Railroad Company is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this eighteenth day of October, in the year of our Lord one thousand nine hundred and seventeen.

[Seal United States Circuit Court of Appeals, Third Circuit.]

JOHN B. McPHERSON,
Circuit Judge.

Service of this citation is accepted on behalf of the defendants in error.

H. W. MOORE,
Counsel for Defendants in Error.

October 19th, 1917.

[Endorsed:] 2195. Citation.

Endorsed on cover: File No. 26,216. U. S. Circuit Court Appeals, 3d Circuit. Term No. 749. Pennsylvania Railroad Company, plaintiff in error, vs. James H. Minds and Julia A. Matz, trading as Bulah Coal Company. Filed October 26th, 1917. File No. 26,216.

-3-

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FILED
MAR 20 1919
JAMES D. MAHER,
CLERK

Nos. 293 & 294. OCTOBER TERM, 1918.

IN THE

Supreme Court of the United States

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES H. MINDS, Surviving and Liquidating Partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company.

PENNSYLVANIA RAILROAD COMPANY, Plaintiff in Error,

vs.

JAMES H. MINDS and JULIA C. MATZ, trading as Bulah Coal Company.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

HENRY WOLF BIKLÉ,
FREDERIC D. McKENNEY,
FRANCIS I. GOWEN,
For Plaintiff in Error.

ALLEN, LANE & SCOTT, PRS., PHILADELPHIA.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1918. NOS. 293 AND 294.

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

James H. Minds, Surviving and Liquidating Partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company.

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

James H. Minds and Julia C. Matz, trading as Bulah Coal Company.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The two cases presented to the Court on these writs of error had their inception in two proceedings initiated before the Interstate Commerce Commission to recover damages claimed to have been sustained on account of an alleged improper distribution of coal cars by The Pennsylvania Railroad Company during the years 1902 to 1907. An award of reparation was made in each instance by the Commission, and these awards not having been paid by the railroad, suits were begun in the District Court of the United States for the Eastern District of Pennsylvania. These suits, which were tried together, eventuated in each instance in a verdict for a sum somewhat less than the amount awarded by the Commission. The cases were then taken by writ of error to the Circuit Court of Appeals for the Third Circuit, where again they were argued and disposed of together, the judgments below being affirmed. (Pennsylvania Railroad Co. *vs.* Minds, 244 Fed. 53, 1917.) From these judgments the cases have been brought by writ of error to this Court, where it seems appropriate to consider them together as they were considered in the Circuit Court of Appeals, since the issues are in a large measure identical, as are also the records.

The facts involved are briefly as follows:—

In June 1902, James H. Minds, the defendant in error in case No. 293 was in partnership with one William J. Matz, and under the name of the Bulah Coal Company operated a mine known as Webster No. 4, which was located in Clearfield County, Pennsylvania, adjacent to the railroad of the plaintiff in error, by which coal produced therefrom was shipped to market. William J. Matz died in April, 1904, and James H. Minds as the surviving partner continued to operate the mine until October, 1904, on which date he entered into a partnership with Julia A. Matz, the widow of William J. Matz, and with her continued to operate the mine under the name of Bulah Coal Company up to and including June 1907.

In the period from June, 1902, to June, 1907, the plaintiff in error had made a pro rata or percentage distribution of its cars among the mines located on its railroad, this being necessary because the aggregate shipping capacity of the mines exceeded the cars available for shipment therefrom and this system of distribution was in effect in the so-called "Tyrone Region" of the railroad in which the mine of the defendants in error was located.

The defendants in error, conceiving that they had not received the number of cars to which under a proper system of distribution they would have been entitled, in the latter part of June, 1907, instituted two proceedings before the Interstate Commerce Commission. One of these proceedings was instituted by James H. Minds as the surviving and liquidating partner of James H. Minds and William J. Matz, lately trading as the Bulah Coal Company, and related to the period extending from June, 1902, to and including September, 1904, and in this proceeding damages in the sum of $80,174.60 were claimed. This proceeding eventuated in an order entered by the Interstate Commerce Commission under date of March 11th, 1912, awarding to the complainant the sum of $18,591.48, with interest at 6 per cent. from June 28th, 1907 (Transcript of Record, No. 293, page 28).

The other of these proceedings was instituted by James H. Minds and Julia A. Matz, trading as the Bulah Coal Company, and related to the period extending from October 1st, 1904, to June 30th, 1907, the damages claimed being the sum of $75,226.99. This proceeding eventuated in an order entered by the Interstate Commerce Commission under date of March 11th, 1912, awarding to the complainant the sum of $31,715.57, with interest from June 28th, 1907 (Transcript of Record, No. 294, page 28).

The plaintiff in error, having failed to pay either of the awards made by the Commission, separate actions thereon were brought by the defendants in error.

In the first of these actions, to wit, that brought in the United States District Court for the Eastern District of

Pennsylvania, by James H. Minds, the surviving and liquidating partner of James H. Minds and William J. Matz lately trading as Bulah Coal Company, to No. 2422 of December Term, 1912 (No. 293 in this Court), the said James H. Minds alleged as his cause of action the order entered by the Interstate Commerce Commission in favor of James H. Minds and Julia A. Matz; and in the second of these actions, to wit, that brought in the United States District Court for the Eastern District of Pennsylvania, by James H. Minds and Julia A. Matz, to No. 2424, of December Term, 1912 (No. 294 in this Court), the said James H. Minds and Julia A. Matz alleged as their cause of action the order entered by the Interstate Commerce Commission in favor of James H. Minds, the surviving and liquidating partner of James H. Minds and William J. Matz.

Subsequently, to wit, on April 5th, 1916, a petition was filed by the plaintiffs respectively asking leave to amend their original petitions so as to substitute in each case as the basis of action the order entered by the Interstate Commerce Commission in favor of the plaintiff in the action. To these petitions, answers were duly filed by the Railroad Company, the plaintiff in error here, pointing out that in each instance the award for the recovery of which the proceeding was brought was not made in favor of the plaintiff, and that the purpose of the plaintiff's petition was to permit the plaintiff to so amend the original petition as to substitute for the order actually sued upon another order made more than a year prior to the filing of the petition for leave to amend. This, it was insisted was in contravention of the provisions of the Act to Regulate Commerce, which require that a petition for the enforcement of an order of the Interstate Commerce Commission for the payment of money shall be filed within one year from the date of the order *and not after*.

The Court, however, permitted in each case the filing of an amended petition and its action in this regard constitutes the basis for the third specification of error in each of these cases.

In the proceedings before the Interstate Commerce Commission inquiry was made as well with respect to the method of distribution pursued by the railroad as with respect to the actual allotment of cars to the defendants in error. In its first or main report the Commission determined what method of distribution should have been followed, and in a supplemental report found that the defendants in error had received in the period of the action fewer cars than they would have received had this method been pursued and determined the amount of the resultant damage to the defendants in error.

In both proceedings the Commission found that the defendants in error would have received, had the system of distribution approved by the Commission been followed, a larger number of cars than they had received under the system followed by the plaintiff in error. According to the Commission's finding defendants in error should have received additional cars which would have enabled them to ship in the earlier period 9523.68 tons and in the later period 71,257.12 tons in addition to the tonnage which was shipped.

This finding of the Commission as to the earlier period has not been and is not controverted by the plaintiff in error. The finding as to the later period is controverted and is made the subject of specifications of error Nos. 7 to 12 inclusive in case No. 294.

The Commission found that if the additional cars had been received, the cost to the defendants in error of mining their coal would have been 88 cents per ton during both periods instead of $1.23 and $1.08, the actual cost, respectively, in the two periods, and the damages which were awarded defendants in error were ascertained upon the basis of this assumed cost.

The finding of the Commission that the defendants in error, had they received the additional cars, would have been enabled to produce and ship coal at a cost of 88 cents per ton was controverted by the plaintiff in error, which contended and still contends that this finding of the Com-

mission was not only unsupported by the testimony, but was directly at variance with that adduced.

The two proceedings in question were heard and disposed of by the Commission in conjunction with three other proceedings of a like character. One of the proceedings thus grouped was that of Jacoby & Co. *vs.* The Pennsylvania Railroad Company, in which an award was made by the Commission, the validity of which finally came before this Court in the case of Pennsylvania Railroad Company *vs.* Jacoby & Co., which is reported in 242 U. S., page 89; and the contention of the plaintiff in error has been and is that the principles settled by this Court in that case invalidates for evidential purposes the findings of the Commission in the second of these cases as to the number of cars which the defendants in error should have received in the later period, and its findings in both as to the assumed cost of mining and shipping coal, had the larger number of cars been furnished to the defendants in error.

The system of distribution approved by the Commission is set forth in the report which will be found at page 235 of the Transcript of Record in No. 293. This report is entitled in the case of the Hillsdale Coal & Coke Company against the Pennsylvania Railroad Company, but, as the report shows, it was intended to be applicable to all the cases embraced in the group, of which the Hillsdale was one.

By this report previous rulings of the Commission were reaffirmed and made applicable to the distribution of cars on the line of the plaintiff in error, which rulings had been to the effect that the owners of private cars were entitled to their exclusive use, and that regardless of the consideration that thereby the mines receiving these cars would receive more than their ratable proportion of all cars available; the owners of private cars were entitled to their exclusive use, and that the owners of mines to which fuel cars were assigned, whether these belonged to the plaintiff in error or to some foreign railroad company, were also entitled to have these cars delivered to them, but that all the private and fuel cars thus placed or delivered

must be counted as cars received by the mines at which they were placed in determining the pro rata allotment to which these mines were entitled of the remaining classes of cars which were available for distribution, these being all cars other than the private and fuel cars.

The Commission refused to disapprove the system of rating the mines established by the railroad (Transcript of Record in No. 293, pages 240 to 244); the rating being determined with reference to the capacity of the mines to produce and dispose of coal and constituting the *basis* upon which cars are allotted to the mines in periods of car shortage.

Having thus determined the system of distribution which should have been followed by the plaintiff in error, the Commission then proceeded in all of the cases comprised in the group to determine what additional cars each of the complainants, including the defendants in error, would have received had its approved system of distribution been followed, and these cars were dealt with in supplemental reports filed by the Commission.

As already stated, the Commission's finding was that in the later of the two periods embraced in the present cases, the defendants in error should have received cars having a loading capacity of 71,257.12 tons. But the Commission did not specifically indicate how it had arrived at this conclusion.

On the trial of the case, with the view of establishing how this figure of 71,257.12 tons had been arrived at, the plaintiff in error introduced a statement which had been compiled by the defendant in error from the records of the plaintiff in error, known as its car distribution sheets and which had been put in evidence before the Commission, from which it appeared that if in the later period the defendant in error had received its pro rata share based upon its mine rating as determined by the Commission of all cars, private, fuel and others, which had been placed by the plaintiff in error in the regions in which its mines were located in this period, it would have received cars equal

to a capacity of the exact tonnage, viz., 71,257.12 tons, which the Commission had found to have been the defendant in error's shortage in cars. The statement in question will be found at page 231 of the Transcript of Record, in No. 293, and the testimony which establishes the exact correspondence between the Commission's finding and the shortage established by this statement, based upon an allocation or allotment to the defendant in error of its share of all the cars and not merely of those which were distributed under the Commission's system of distribution, will be found beginning at page 129 of the same Transcript of Record: (*v. infra*, page 37).

The Commission's finding with respect to the question of the cost at which the coal could have been mined and shipped by the defendants in error in the two periods involved a mathematical absurdity. The Commission found in the first period that the cost of mining the coal which had been produced was $1.23 a ton, and as the tonnage mined in this period had aggregated 110,892 tons, the total cost was $125,397.16, and it further found that if 9523.68 additional tons had been mined, the cost per ton for the entire output would have been 88 cents. By applying this 88 cents to the total increased output, viz., 120,415.68 tons, it will be seen that based upon the Commission's finding of a cost of 88 cents, the increased output would have been produced at actually less outlay than that required for the production of the tonnage actually produced, and this notwithstanding the fact that it was conceded that the defendants in error would have been obliged to pay not less than 73 cents per ton on account of miners' wages and royalty on the 9523.68 additional tons had these been mined.

In the later or second period the actual cost of producing the coal which had been mined was $1.08, and the assumed reduction, therefore, from the actual to the theoretical cost of 88 cents was not so great, but in this period also the finding of the Commission involved, although to a lesser extent, the same mathematical absurdity as did its finding of theoretical cost in the earlier period.

In its award to James H. Minds, the surviving and liquidating partner of James H. Minds and William J. Matz, the Interstate Commerce Commission allowed $18,591.48, whereas Minds had claimed $80,174.60; and in the award to James H. Minds and Julia A. Matz, the Commission allowed $31,715.99, whereas these complainants had claimed $75,226.99; and in making these awards, the Commission also allowed interest from June 28th, 1907. In the District Court, the allowance of interest was objected to as was also the allowance of any interest on account of the cause of action alleged in plaintiff's petition, since the finding of the Commission and also the evidence in the case showed clearly the inflated nature of the demand of the defendants in error. The failure of the Court to rule in accordance with the requests made in this regard constitutes the fourth point which the plaintiff in error desires to argue. In case No. 293 the point is covered by Specifications of Error Nos. 5, 8, and 9. In case No. 294 the point is covered by Specifications of Error Nos. 5, 14 and 15.

After the trial of the case, counsel for the defendants in error asked that counsel fees be awarded, and in case No. 293 a counsel fee of $3250 was allowed and in case No. 294 a counsel fee of $6750 was allowed. The plaintiff in error believes these fees were excessive and also without legal warrant, since they were not restricted to the services of counsel rendered in connection with the initiation and prosecution of the cases in the District Court. This constitutes the final point which the plaintiff in error desires to argue. It is covered by Specifications of Error Nos. 12, 13 and 14 in case No. 293 and by Specifications of Error Nos. 18, 19 and 20 in case No. 294.

In the first case, the jury found a verdict of $16,092.92 in favor of James H. Minds, the surviving and liquidating partner of James H. Minds and William J. Matz.

In the second case, the jury found a verdict of $33,-618.37 in favor of James H. Minds and Julia A. Matz, co-partners trading as Bulah Coal Company.

SPECIFICATIONS OF ERROR.

[CASE No. 293.]

1. The said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania for $16,092.92, and costs of suit, entered on the tenth day of November, A. D. 1916, in favor of said defendant in error and against said plaintiff in error.

2. The said Circuit Court of Appeals erred in not reversing the said judgment of the United States District Court for the Eastern District of Pennsylvania and in not remanding the said cause to the said District Court for a new trial.

3. The said Circuit Court of Appeals erred in not sustaining the first assignment of error in the said cause, which assignment was as follows: —

> "I. The learned trial Judge erred in entering the order made by him on the tenth day of April, 1916, granting leave to the plaintiff to amend the original petition filed in this case, the effect of the amendment thus allowed being to enable the plaintiff to assert a cause of action based upon an order of the Interstate Commerce Commission other than the order on which suit had originally been brought, which substituted order had been made by the Interstate Commerce Commission more than a year prior to the date of the allowance of the amendment."

4. The said Circuit Court of Appeals erred in not sustaining the second assignment of error in the said cause, which assignment was as follows:—

> "II. The learned trial Judge erred in charging the jury as follows:

" 'Now, gentlemen, there is another question in this case, and that is this: There is a dispute as to the tonnage between these parties to this extent, and that bears also upon this question of cost, and the defendant presents to you this view of it: They figure up—and I will only give you the round figures instead of going into the actual figures, because they are somewhat confusing, but it will give you the idea—the defendant presents this view of it, that the actual total cost of the tonnage which was put out amounted in round figures to $136,000. If the increased tonnage could have been put out at 88 cents, then the total cost instead of being $136,000 would have been only $105,000. The defendant, therefore, presents that view to you.

" 'Let me see if I can make it clearer by a simpler illustration, and taking small figures, because these large figures are a little confusing. Suppose a man is manufacturing or producing anything, and his total cost for producing it is $123. Now, you inquire how many units of product he has put out, how many anything, no matter what it is, and you find out he has put one hundred. Now, $123 that it has cost him, divided by one hundred, would give $1.23 per unit, when it has cost him $123 in the aggregate. Now, suppose you increase his units to one hundred and twenty, and you find that according to his calculation that his aggregate cost instead of increasing, as you would naturally expect it to do, in accordance with the increased output, or if it did not increase it would be difficult to understand how it would decrease—and you find that his aggregate cost instead of being $123 has been cut down to $105. You say, "How can that be? I can easily understand that if a man spends $123 to put out one hundred things his unit cost is $1.23 for each one. That is clear enough. If he only puts out fifty then his cost for each one is double that. If he puts out two hundred at the same cost, then his cost per unit, is half of the $1.23. That is clear enough. But if it costs a

man $123 to put out one hundred, how can he possibly put out one hundred and twenty for $105?" Your conclusions would be that there was something wrong in the calculation of unit cost. You must have it too low. That is the question for you to determine in this case, because it bears upon both the aggregate of this claim and bears upon the unit cost, and therefore we have the testimony which has been adduced before you to show that there is an inaccuracy in the claim presented by the plaintiff in that respect. Of course, gentlemen, while as a mathematical proposition that is obviously true, and that mathematically speaking it would be absurd for a man to say that he could produce one hundred things for $123 but if he increased his output to one hundred and twenty, produced twenty more of the same things in the same way, he would cut down his aggregate cost from $123 to $105. But you are to consider the argument addressed to you by counsel upon the other side, and their explanation of that phenomenon. I do not pretend to present all of it to you, but just enough to give you an illustration. Take a man who is shipping coal, for instance, and all his cars come in to him in a regular way at the times at which he may employ his men right at once in filling them, getting them out of the way, bringing empties in and filling them and getting them out of the way, the result would be that he could get them out at a unit cost of a certain amount per ton, but if he had the men there and their wages going on and all the other expenses going on, and they were standing there idle doing nothing for an hour or two hours or three hours, or there were breaks and interruptions in the continuity of his work in the one case, then it would be easily understood that under one condition of work it might cost the man $123 to get out one hundred tons, and under the other more favorable conditions of work he might be able to get out one hundred and twenty tons at an aggregate cost of $105.' "

5. The said Circuit Court of Appeals erred in not sustaining the third assignment of error in the said cause, which assignment was as follows:—

> "III. The learned trial Judge erred in charging the jury as follows:
>
> " 'In other words, you find the damages as you think they were on June 28th, 1907, and then you add to it such sum as in your judgment will make the money received now the equivalent of that received on June 28th, 1907. That must not exceed six per cent. interest.' "

6. The said Circuit Court of Appeals erred in not sustaining the ninth assignment of error in the said cause, which assignment was as follows:—

> "IX. The learned trial Judge erred in refusing to affirm the eleventh point submitted by the defendant, as follows:
>
> " '11. The evidence has shown that if the plaintiffs had mined 9523.68 additional tons they would have been obliged to pay for each ton the miners' wages, which would have been 62 cents a ton prior to April 1st, 1903, and 66 cents a ton thereafter, and a royalty of 10 cents a ton. Upon the basis of an average mining charge for the period of 63 cents a ton, the additional cost that the plaintiffs would have been subjected to had they mined the additional 9523.68 tons would have been 73 cents per ton, and the aggregate cost of mining the additional 9523.68 tons would have been $6952.28. If the jury believe the testimony as to this additional cost, and there is nothing to contradict it, it is mathematically demonstrable that the cost of mining the 120,415.68 tons would have been $1.19 per ton, and this figure should be accepted by the jury in arriving at the plaintiff's damages.' "

7. The said Circuit Court of Appeals erred in not sustaining the tenth assignment or error in the said cause, which assignment was as follows:—

"X. The learned trial Judge erred in refusing to affirm the twelfth point submitted by the defendant, as follows:

" '12. The Commission found, and this finding is not contradicted, and should be consequently accepted by the jury, that the plaintiffs would have realized an average price of $1.598 per ton for the 9523.68 additional tons, and if the jury find that the plaintiffs' average cost of producing the same would have been $1.19 per ton, the difference between these two amounts, viz., 40.8 cents, represents the profit per ton which the plaintiffs failed to realize in the period of the action because of the non-receipt of the cars for the shipment of the 9523.68 additional tons.' "

8. The said Circuit Court of Appeals erred in not sustaining the eleventh assignment of error in the said cause, which assignment was as follows:—

"XI. The learned trial Judge erred in refusing to affirm the sixteenth point submitted by the defendant, as follows:

" '16. The plaintiffs are not entitled to recover interest on the amount of the award from June 28th, 1907, to the date on which the award was made.' "

9. The said Circuit Court of Appeals erred in not sustaining the twelfth assignment of error in the said cause, which assignment was as follows:—

"XII. The learned trial Judge erred in refusing to affirm the seventeenth point submitted by the defendant, as follows:

" '17. The plaintiffs are not entitled to recover interest on the amount of the award from the date on which the award was made.' "

10. The said Circuit Court of Appeals erred in not sustaining the thirteenth assignment of error in the said cause, which assignment was as follows:—

"XIII. The learned trial Judge erred in refusing to affirm the eighteenth point submitted by the defendant, as follows:

"'18. Under the law and the evidence, the plaintiffs are not entitled to recover and your verdict should be for the defendant.'"

11. The said Circuit Court of Appeals erred in not sustaining the fourteenth assignment of error in the said cause, which assignment was as follows:—

"XIV. The learned trial Judge erred in entering judgment in favor of the plaintiffs and against the defendant upon the verdict of the jury.

12. The said Circuit Court of Appeals erred in not sustaining the fifteenth assignment of error in the said cause, which assignment was as follows:—

"XV. The learned trial Judge erred in allowing a counsel fee of $3250, since such counsel fee was excessive."

13. The said Circuit Court of Appeals erred in not sustaining the sixteenth assignment of error in the said cause, which assignment was as follows:—

"XVI. The learned trial Judge erred in allowing a counsel fee of $3250, since such fee was made with reference to services of counsel before the Interstate Commerce Commission as well as in connection with the institution and prosecution of the present action in the District Court."

14. The said Circuit Court of Appeals erred in not sustaining the seventeenth assignment of error in the said cause, which assignment was as follows:—

"XVII. The learned trial Judge erred in allowing a counsel fee of $3250, since such fee was not restricted

to the services of counsel rendered in connection with the initation and prosecution of the case in the District Court."

[Case No. 294.]

1. The said Circuit Court of Appeals erred in entering judgment affirming the judgment of the District Court of the United States for the Eastern District of Pennsylvania for $33,618.37, and costs of suit, entered on the tenth day of November, A. D. 1916, in favor of said defendants in error and against said plaintiff in error.

2. [Identical with Specification No. 2, in Case 293; *v. supra*, page 10.]

3. [Identical with Specification No. 3, in Case 293; *v. supra*, page 10.]

4. [Identical with Specification No. 4, in Case 293; *v. supra*, page 10.]

5. [Identical with Specification No. 5, in Case No. 293; *v. supra*, page 13.]

6. The said Circuit Court of Appeals erred in not sustaining the sixth assignment of error in the said cause, which assignment was as follows:—

"VI. The learned trial Judge erred in refusing to affirm the third point submitted by the defendant, as follows:

" '3. The Interstate Commerce Commission ascertained the number of cars which the plaintiffs, in the judgment of the Commission, should have received in the period of the action with reference to a rule of distribution promulgated by the Commission after the close of the period of the action. The Commission had no power to make its rule of distribution retroactive,

and hence its conclusion or finding as to the number of cars that the plaintiffs should have received, and its award of damages based thereon are invalid and afford no basis for a recovery in the present case.'" (Record, page 313.)

7. The said Circuit Court of Appeals erred in not sustaining the seventh assignment of error in the said cause, which assignment was as follows:—

"VII. The learned trial Judge erred in refusing to affirm the fourth point submitted by the defendant, as follows:

"'4. In determining the number of cars to which the plaintiffs were entitled the Interstate Commerce Commission was not at liberty to disregard the rule of distribution which it had itself promulgated, but was required to ascertain such number in accordance with this rule.'" (Record, page 314.)

8. The said Circuit Court of Appeals erred in not sustaining the eighth assignment of error in the said cause, which assignment was as follows:—

"VIII. The learned trial Judge erred in refusing to affirm the fifth point submitted by the defendant, as follows:

"'5. Under the rule of distribution prescribed by the Interstate Commerce Commission the plaintiffs were not entitled in the period of the action to any individual cars belonging to other shippers or to any fuel cars either of the defendant or of any other railroad company if these were consigned to other mines. The plaintiffs were entitled to their own individual cars and to their just and proper share of the cars which the defendant had available for distribution among shippers.'" (Record, page 314.)

9. The said Circuit Court of Appeals erred in not sustaining the ninth assignment of error in the said cause, which assignment was as follows:—

"IX. The learned trial Judge erred in refusing to affirm the sixth point submitted by the defendant as follows:

"'6. If the testimony has satisfied the jury that the Interstate Commerce Commission in arriving at the number of cars which the plaintiffs should have received ascertained this number by treating as justly allottable to them the percentage which their mine rating entitled them to of the aggregate of all the cars which were placed by the defendant at the mines in the region in which the plaintiffs' mine was located, regardless of the consideration that there were included in this aggregate a large number of indivdual cars belonging to other shippers, and fuel cars of the defendant and of other railroad companies, which had been placed at other mines, the method adopted by the Commission for ascertaining the number of cars which the plaintiffs should have received was not in accordance with its own rule and was consequently erroneous, and the finding or conclusion of the Commission as to the number which the plaintiffs should have received was therefore invalid and affords no basis for a recovery in the present action." (Record, page 314.)

10. The said Circuit Court of Appeals erred in not sustaining the tenth assignment of error in the said cause, which assignment was as follows:—

"X. The learned trial Judge erred in refusing to affirm the seventh point submitted by the defendant, as follows:

"'7. It appears from the evidence that in arriving at the number of additional cars which, in its judgment, the plaintiffs should have received, the Interstate Commerce Commission failed to give effect in certain periods to the rule of the defendant in force at the time and approved by the Commission by which cars placed at mines were counted as part of the mine's

quota on each day on which they were available for shipments. This rule was a lawful and proper one, and the Commission was not justified in ignoring or disregarding it.'" (Record, page 315.)

11. The said Circuit Court of Appeals erred in not sustaining the eleventh assignment of error in the said cause, which assignment was as follows:—

"XI. The learned trial Judge erred in refusing to affirm the defendant's eighth point as follows:

"'8. The defendant has submitted a statement prepared by a public accountant, purporting to show the number of cars which the plaintiffs would have received if distribution had been made by the defendant in accordance with the rule of the Interstate Commerce Commission. It appears from this statement that the additional cars to which they would have been entitled would not have exceeded 739 cars. Treating each car as having a capacity of thirty-five tons, the tonnage which could have been transported in these cars would have been 25,865 tons, and this tonnage should be accepted by the jury as representing that which the plaintiffs should have received cars for the shipment of, if the jury believe that the statement prepared by the accountant correctly shows the number of cars which, under the Commission's rule of distribution, plaintiffs were entitled to receive in addition to those which were actually delivered to them." (Record, page 315.)

12. The said Circuit Court of Appeals erred in not sustaining the twelfth assignment of error in the said cause, which assignment was as follows:—

"XII. The learned trial Judge erred in refusing to affirm the eleventh point submitted by the defendant, as follows:

"'11. The evidence adduced upon behalf of the defendant has shown that if the plaintiffs had mined any

additional tons in the period of the action, they would have been obliged to pay or expend for each ton the miners' wages, which would have been 63 cents a ton, and the royalty on the coal mined, which would have been not less than ten cents a ton, and that if they had mined 71,257 tons, there would have been additional expense of 7 cents per ton on account of ventilation and supplies, and 6 cents per ton on account of transportation, making a total additional expense of 86 cents per ton. If the jury believe this testimony as to this additional cost, the cost per ton of the coal mined including these 71,257 additional tons, would have been $1.00.'" (Record, page 316.)

13. The said Circuit Court of Appeals erred in not sustaining the thirteenth assignment of error in the said cause, which assignment was as follows:—

"XIII. The learned trial Judge erred in refusing to affirm the twelfth point submitted by the defendant, as follows:

"'12. The evidence has shown that if the plaintiffs had mined any additional tons in the period of the action, they would have been obliged to pay or expend for each ton, the miners' wages, which would have been 63 cents a ton, and the royalty on the coal mined which would have been not less than 10 cents a ton. The additional cost that the plaintiffs would have been subjected to, therefore, had they mined any additional tonnage would have been not less than 73 cents per ton. If the jury believe this testimony as to this additional cost, and there is nothing to contradict it, the cost per ton if 25,865 tons had been mined would have been $1.026.'" (Record, page 316.)

14. [Identical with Specification No. 8 in Case 293; *v. supra*, page 14.]

15. [Identical with Specification No. 9 in Case 293; *v. supra*, page 14.]

16. [Identical with Specification No. 10 in Case 293; *v. supra*, page 14.]

17. [Identical with Specification No. 11 in Case 293; *v. supra*, page 15.]

18. The said Circuit Court of Appeals erred in not sustaining the eighteenth assignment of error in the said cause, which assignment was as follows:—

> "XVIII. The learned trial Judge erred in allowing a counsel fee of $6750, since such counsel fee was excessive."

19. The said Circuit Court of Appeals erred in not sustaining the nineteenth assignment of error in the said cause, which assignment was as follows:—

> "XIX. The learned trial Judge erred in allowing a counsel fee of $6750, since such a fee was made with reference to services of counsel before the Interstate Commerce Commission as well as in connection with the institution and prosecution of the present action in the District Court."

20. The said Circuit Court of Appeals erred in not sustaining the twentieth assignment of error in the said cause, which assignment was as follows:—

> "XX. The learned trial Judge erred in allowing a counsel fee of $6750, since such fee was not restricted to the services of counsel rendered in connection with the initiation and prosecution of the case in the District Court."

ARGUMENT.

In these two cases, which were consolidated for the purpose of trial and for argument in the Circuit Court of Appeals, the issues are so similar that it has seemed not only practicable but desirable to discuss them in one brief. They involve shipments from the same mine during two different, but successive periods. The principles involved are substantially the same in each case. Where there is any difference, it will be pointed out in the course of the argument.

1. THE DISTRICT COURT SHOULD NOT HAVE PERMITTED THE DEFENDANTS IN ERROR TO AMEND THEIR PETITIONS SO AS TO SUE ON ORDERS ENTERED BY THE INTERSTATE COMMERCE COMMISSION WHICH HAD NOT BEEN MADE THE BASIS OF THEIR ORIGINAL PETITIONS. THESE ORDERS HAD BEEN MADE MORE THAN A YEAR PRIOR TO THE FILING OF THE PETITIONS FOR LEAVE TO AMEND THE ORIGINAL PETITIONS.*

As has been pointed out in the statement of facts, the plaintiffs in these two separate actions operated the same mine, but during different periods. In the first period, extending from July 1st, 1902, to October 1st, 1904, the mine was owned and operated by a partnership consisting of James H. Minds and William J. Matz, and with respect to this period Mr. Minds sued as the surviving and liquidating partner of the partnership, Mr. Matz having died in the early part of the year 1904. During the second period, extending from October 1st, 1904, to June 30th, 1907, the mine was owned and operated by a new partnership consisting of James H. Minds and Julia A. Matz. In view of the fact that the mine was thus operated by two distinct partnerships, two proceedings were initiated before the Interstate Commerce Commission, one a proceeding

* This point is covered by specifications of error Nos. 1, 3, 10 and 11, in case 293, and specifications of error Nos. 1, 3, 16 and 17, in case 294.

known on the docket of the Interstate Commerce Commission as No. 1137, in which James H. Minds, the surviving and liquidating partner of James H. Minds and William J. Matz, was the complainant, and the second known on the docket of the Interstate Commerce Commission as case No. 1136, in which James H. Minds and Julia A. Matz were the complainants. The first proceeding eventuated in an order in favor of the complainants for $18,591.48, entered by the Commission on March 11th, 1912. On the same day, the Commission entered an order in case No. 1136 in favor of James H. Minds and Julia A. Matz for $31,715.57.

The Railroad Company having failed to pay the amounts awarded by the Interstate Commerce Commission, actions were begun in the District Court; but, in the petitions filed, each petitioner set up as its cause of action, not the award made in its favor, but the award made in favor of the other partnership. Thus, as appears on page 5 of the Transcript of Record, in case No. 293 James H. Minds the surviving and liquidating partner, sues to recover $31,715.57, with interest, and alleges as the basis of his action the order entered by the Interstate Commerce Commission in case No. 1136 (see page 10 of the Transcript of Record), and in case No. 294 James H. Minds and Julia A. Matz sue to recover $18,591.48 (page 5 of the Transcript of the Record), and set up as the basis of their action the order entered by the Commission in case No. 1137 (see page 10 of the Transcript of Record).

On April 5th, 1916, more than four years after the date of the orders entered by the Interstate Commerce Commission, the plaintiffs filed petitions in their respective cases to amend the original petitions so as to enable them to sue on the orders entered in their own favor, and these petitions were allowed over the objections of the Railroad Company. It is respectfully submitted that the action of the Court in permitting this amendment was improper.

Section 16 of the Act to Regulate Commerce provides in the last sentence of paragraph 2 that

> "A petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court or the State Court within one year from the date of the order, and not after."

The binding effect of this provision is well illustrated in the case of Phillips & Co. *vs.* Grand Trunk Western Ry., 236 U. S. 662 (1915). In that case the plaintiff brought suit in the United States Circuit Court for the Eastern District of Michigan, claiming to recover overcharges in connection with certain shipments of lumber. It appeared that the shipments had moved under a rate which, in another proceeding to which the plaintiff was not a party, had been found by the Interstate Commerce Commission to be unreasonable. The plaintiff, however, had presented no complaint to the Interstate Commerce Commission, and at the time suit was begun in the United States Circuit Court, it was too late for him to do so. Commenting upon that provision of Section 16 of the Act to Regulate Commerce, which is in immediate juxtaposition with the provision just referred to, and which requires that "all complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after," this Court held that, under such a statute the lapse of time not only bars the remedy but destroys the liability, whether complaint is filed with the Commission or suit is brought in a court of competent jurisdiction. The Court says (page 667): "The prohibitions of the statute against unjust discrimination relate not only to inequality of charges and inequality of facilities, but also to the giving of preferences by means of consent judgments or the waiver of defenses open to the carrier. The Railroad Company therefore was bound to claim the benefit of the statute here and could do so here by general demurrer. For when it appeared that the complaint had not been filed within the time required by the statute it was evident, as matter of law, that the plaintiff had no cause of action."

The situation in the present proceedings is directly within the principle announced in this case. Whatever may have

been the reason for the form of petition filed in each of these cases, the fact is that each plaintiff sued on an order in favor of the other plaintiff. It did not sue on the order made in its favor and its effort to correct this by an amendment made more than four years after the date of the order entered by the Interstate Commerce Commission is clearly prohibited by the terms of the statute as interpreted in the Phillips case referred to.

In addition, the rule is well settled that defenses of this character may not be waived by the carriers: Georgia &c. Ry. *vs.* Blish Co., 241 U. S. 190 (1916), at page 197; M. K. & T. Ry. Co. *vs.* Ward, 244 U. S. 383 (1917) at page 388; U. S. *ex rel.* Louisville Cement Co. *vs.* I. C. C., 246 U. S. 638 (1918): cf. B. & O. *vs.* Leach, No. 132, Oct. T., 1918, decided Mar. 10, 1919.

The defendant in error cannot properly contend that the petitions were erroneous in an incidental feature. Each one clearly identifies the order upon which suit was brought and each one sets forth the precise amount awarded not to the petitioner, but to some one else. As a consequence, the amendment introduced a new cause of action and one which could not properly be introduced because of the specific provision of the Act to Regulate Commerce referred to.

In dealing with this feature of the situation the Circuit Court of Appeals did not question the correctness of the Railroad's statement of what took place. On the contrary the Court, confirming this statement said:—

> "Two proceedings were brought, the first by Minds as surviving partner, covering the first period; the claim was for about $80,000 damages, and in March, 1912, a reparation order was entered for about $18,600 with interest from June 28, 1907. The second proceeding was by Minds and Julia Matz, trading as the Bulah Coal Company, and covered the second period; the claim was for about $75,000 damages and the order, also entered in March, 1912, was for about $31,700 with interest from June 28, 1907. Neither award was paid, and on each a separate action was brought. By mistake the awards were confused, so that *Minds as*

> *surviving partner sued on the order entered in favor of Minds and Julia Matz, while Minds and Julia Matz sued on the order entered in favor of Minds as surviving partner.** This was an obvious blunder, and on April 10th, 1916, the District Court allowed the orders to be transposed, the Railroad objecting, then and now, on the ground that such an amendment could not be granted after one year from the date of the orders." (Transcript of Record, page 345.)†

But the Court, having thus stated correctly what had taken place, says in disposing of the Railroad's objection:—

> "As we understand, however, this position is not much relied on, and in any event we see no reason to say anything about it except to approve the action of the District Court in setting right what was a plain and harmless mistake. Its correction did the Railroad no possible injury." (Transcript of Record, page 345.)

It is earnestly insisted by counsel for the Railroad that the Court labored under a misapprehension in suggesting that the point was "not much relied on," since it has been emphatically urged at every stage of this litigation. But, even had this not been the case, the Railroad, under the authorities cited, would not have been justified in waiving the point, nor the Court in holding that it had been waived.

2. INSTRUCTIONS GIVEN BY THE COURT WITH RESPECT TO THE FINDINGS OF THE INTERSTATE COMMERCE COMMISSION AS TO THE AVERAGE COST OF PRODUCTION WHICH WOULD HAVE BEEN INCURRED HAD THE DEFENDANTS IN ERROR BEEN FURNISHED WITH THE ADDITIONAL CARS TO WHICH THE COMMISSION FOUND THEY WERE ENTITLED.‡

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* Italics ours.

† Where in this argument the "Transcript of the Record" is referred to, the transcript in case No. 293 is intended unless otherwise specified.

‡ This point is covered by specifications of error Nos. 4, 6 and 7, in case 293, and specifications of error Nos. 4, 12 and 13, in case 294.

In ascertaining the damages to be awarded the defendants in error, the Interstate Commerce Commission made findings as to the additional tonnage which might have been mined and shipped with the additional cars to which they held the Coal Companies entitled, and also findings as to the hypothetical cost of production which would have been incurred if this additional tonnage had been mined during the two periods of action, and as to the possible prices which might have been received for the coal. Obviously, therefore, this hypothetical cost of mining constitutes an important and essential increment in determining the measure of the plaintiff's recovery, and if it is erroneous results in an erroneous award. The testimony shows beyond doubt that the findings of the Commission in this regard are patently wrong.

With respect to the first period, viz., that covered by case No. 293, the Interstate Commerce Commission found (Transcript of Record, page 22), that if the Coal Company had been able to mine the additional tonnage for which the Commission finds they were entitled to receive additional cars, they would have been able to produce an output of 9523.68 tons in addition to the tonnage actually produced. They found further that during this period the mine actually shipped 110,892 tons, and that the actual average cost of the tonnage produced was $1.23 (Transcript of Record, pages 22 and 23). The Commission further finds that, had the mine been able to produce the additional 9523 tons, the cost of mining would have been only 88 cents per ton. This, on its face, seems to be, as the trial Judge was inclined to describe it, a mathematical absurdity (Transcript of Record, page 300), since, if these figures are correct, they mean that the aggregate cost of mining the coal actually mined, plus the cost of mining the additional 9523 tons would have been less than the cost of mining the coal which was in fact mined. Thus the tons actually mined and shipped during the first period as found by the Commission amounted to 110,892, and the average cost of mining this tonnage was, as found by the Commission, $1.23.

This would make an aggregate cost for this tonnage of $136,397.16. The Commission found that with the cars to which they were entitled, the plaintiffs could have mined during this first period 9523.68 tons additional, or a total tonnage of 120,415.68. At 88 cents per ton, the average cost found by the Commission, this would mean a total aggregate cost of $105,965.80. In other words, more than $20,000 less than it cost to mine the tonnage that was actually mined. Obviously, if the Commission's finding had even the semblance of reasonableness, it would have been economical for the plaintiffs to have mined this additional tonnage and burned it at the pit's mouth; and this they should have done under the well settled rule of law, which makes it their duty to take all reasonable measures to minimize the damages resulting from the defendant's alleged wrong doing. The truth is, however, that the finding of the Commission is preposterous.

If we assume that the additional tonnage of 9523.68 could have been mined for nothing, and that the plaintiffs could have obtained therefor the price referred to by the Commission, viz., $1.598, they would have obtained $6197.00 for this tonnage, and yet the jury has awarded them $10,990.11, to which they have added interest. It is difficult to imagine a case in which it could be demonstrated more conclusively that the findings of the Commission are founded upon an improper basis.

However, the Court in offering an explanation to the jury of this conclusion of the Commission, which was characterized substantially as a mathematical absurdity, suggested certain possibilities, *e. g.*, irregularity of car supply, which, it was said, might tend to explain the Commission's finding and validate it. It is respectfully submitted that there is no evidence in the record which would indicate that the irregularities referred to by the learned trial Judge would have operated in the manner suggested, *particularly in view of the finding of the Commission that there was no basis on which they could assess any damages except on the basis of a failure of the Coal Companies to receive their proper proportion of cars available for distribution.*

Thus in its findings of fact the Commission says (see page 228 of the Transcript of Record):—

> "While there are also other things shown of record which put the defendant on explanation and properly subject it to just criticism, the only point upon which the record affords a sufficient basis for affirmative findings grows out of the rules and system then in effect for the distribution of available equipment among the various coal mining operations."

Again, on page 54 of its original report (20 I. C. C.), (see page 227 of the Transcript of the Record), the Commission finds as follows:—

> "The complainants characterize as a special discrimination against their mine the fact, as is alleged, that they repeatedly had great difficulty in getting the trainmen and agents of the defendants to place on their siding and at their tipple the cars that had been assigned for delivery to them. It is said that the cars were frequently left at the foot of the siding, and that the complainants had to pull them into place with mules. It is also said that the cars were frequently delivered so late in the morning as not to leave them available during that day, and that cars delivered late in the day were not infrequently charged against that day's quota of cars and against the quota of the following day as well. On these matters, however, we do not find a sufficient basis in the record for affirmative conclusion, or anything to indicate that the complainants in those respects were put by the defendants on any less favorable basis than their competitors."

Furthermore, the findings of the Commission as read into the record by the plaintiff on page 71 of the Transcript of Record, show that the award is based entirely on the same proposition, the damages being measured by the tonnage which might have been mined, sold and shipped "if the

complainants had received their proper proportion of the cars available for distribution."

None of the testimony in the present record affords any other basis for the finding of any damages by the jury, and consequently the only verdict which can be justified under the evidence is a verdict based on the cost of mining and producing the additional tonnage which could have been mined and produced had additional cars been available for transportation.

It is true that there was read into the record testimony taken before the Interstate Commerce Commission indicating irregularities in the distribution of cars to the coal companies, but *this action is founded on discrimination*, and unless this testimony had been supplemented by evidence that these coal companies fared in this regard differently from other companies, the testimony constitutes no basis for an award of damages. The testimony of Mr. Davis with regard to the deliveries to the Berwind-White Coal Mining Company does not in any way show that that Company was preferentially treated, since this testimony did not show the character of cars delivered to that Company. As is pointed out in the report of the Commission attached to the plaintiff's petition (Transcript of Record, page 33), the greater regularity of car supply made available to the Berwind-White Coal Mining Company was partly explained by the fact that that Company owned a large supply of private cars and had railway fuel contracts. The findings of the Commission just referred to negative any differential treatment in this respect and consequently the Coal Companies are relegated to the one basis of recovery, and the only relevant question is whether their cost of production would have been reduced to the extent found, had they received additional cars.

Simple mathematics show that the Commission is entirely wrong in this feature of the case. But, in addition, it must be remembered that, as testified by Mr. Hatfield (pages 81 to 88 of the Transcript of Record) *every additional ton of coal would have involved certain inescapable*

costs. As he explained, during the first period it would have been absolutely necessary to pay the so-called mine rate and the royalty. The mine rate, as testified by Mr. Davis, was 62 cents up to April, 1903, after which it was 66 cents (Transcript of Record, page 81). The royalty was in no case less than 10 cents per ton (Transcript of Record, page 80). Consequently, Mr. Hatfield testifies each additional ton of coal mined during the first period would have involved an inescapable additional cost of 73 cents per ton, and that this would have resulted in an average cost of $1.19 per ton for the tonnage which the Commission finds was the total tonnage which the plaintiff was entitled to mine and ship during this period.

The situation is substantially similar during the second period, that is, during the period covered by case No. 294, with the qualification that the Commission's finding in this period does not involve the palpable mathematical absurdity which appears in the first period. But, as testified by Mr. Hatfield, in this period the additional tonnage which the Commission finds might have been mined and shipped is a much larger proportion of that which was actually mined and shipped than in the case in the first period; and he therefore testifies that there would have been certain inescapable costs in addition to the mine rate and the royalty consisting of a cost of gathering and delivery fixed at 7 cents per ton and a cost of ventilation and mine supplies fixed at 6 cents per ton, which make a total inescapable cost for each additional ton of coal of 86 cents (Transcript of Record, page 87). With these additional inescapable costs the average cost per ton, as testified by the witness, would have been $1.00 instead of 88 cents, as found by the Interstate Commerce Commission (Transcript of Record, page 23).

To bring this matter properly before the jury, the Railroad Company presented in case 293 its points 11 and 12, the refusal of which is covered by specifications of error Nos. 6 and 7. In case No. 294 covering the second period, the same question was presented by points Nos. 11 and 12,

the refusal of which is covered by specifications of error in this case Nos. 12 and 13. These points were as follows:—

"11. [Case 293] The evidence has shown that if the plaintiffs had mined 9523.68 additional tons they would have been obliged to pay for each ton the miners' wages, which would have been 62 cents a ton prior to April 1st, 1903, and 66 cents a ton thereafter, and a royalty of 10 cents a ton. Upon the basis of an average mining charge for the period of 63 cents a ton, the additional cost that the plaintiffs would have been subjected to had they mined the additional 9523.68 tons would have been 73 cents per ton, and the aggregate cost of mining the additional 9523.68 tons would have been $6952.28. If the jury believe the testimony as to this additional cost, and there is nothing to contradict it, it is mathematically demonstrable that the cost of mining the 120,415.68 tons would have been $1.19 per ton, and this figure should be accepted by the jury in arriving at the plaintiff's damages." (Record, page 310.)

"12. [Case 293] The Commission found, and this finding is not contradicted, and should be consequently accepted by the jury, that the plaintiffs would have realized an average price of $1.598 per ton for the 9523.68 additional tons, and if the jury find that the plaintiffs' average cost of producing the same would have been $1.19 per ton, the difference between these two amounts, viz., 40.8 cents, represents the profit per ton which the plaintiffs failed to realize in the period of the action because of the non-receipt of the cars for the shipment of the 9523.68 additional tons." (Record, page 311.)

"11. [Case 294] The evidence adduced upon behalf of the defendant has shown that if the plaintiffs had mined any additional tons in the period of the action, they would have been obliged to pay or expend for each ton, the miners' wages, which would have been 63

cents a ton, and the royalty on the coal mined, which would have been not less than 10 cents a ton, and that if they had mined 71,257 tons, there would have been additional expenses of 7 cents per ton on account of ventilation and supplies, and 6 cents per ton on account of transportation, making a total additional expense of 86 cents per ton. If the jury believe this testimony as to this additional cost, the cost per ton of the coal mined including these 71,257 additional tons, would have been $1.00." (Record, page 316.)

"12. [Case 294] The evidence has shown that if the plaintiffs had mined any additional tons in the period of the action, they would have been obliged to pay or expend for each ton, the miners' wages, which would have been 63 cents a ton, and the royalty on the coal mined, which would have been not less than 10 cents a ton. The additional cost that the plaintiffs would have been subjected to, therefore, had they mined any additional tonnage would have been not less than 73 cents per ton. If the jury believe this testimony as to this additional cost, and there is nothing to contradict it, the cost per ton if 25,865 tons had been mined would have been $1.026." (Record, page 316.)

The Court having refused to affirm these points, discussed the matter in a portion of his charge, which constitutes the second assignment of error in each case (printed on pages 294 to 297 in the Transcript of Record). As there appears, the Court sought to afford the jury a basis for accepting the finding of the Commission in the face of the evidence adduced, and although the support which he seeks to furnish is not justified by the Record. As will be observed by referring to the charge, he says, after pointing out the Railroad's contention:—

"But you are to consider the argument addressed to you by counsel upon the other side, and their explanation of that phenomenon. I do not pretend to

present all of it to you, but just enough to give you an illustration. Take a man who is shipping coal, for instance, and all his cars come to him in a regular way at the times at which he may employ his men right at once in filling them, getting them out of the way, bringing empties in and filling them and getting them out of the way, the result would be that he could get the amount at a unit cost of a certain amount per ton, but if he had the men there and their wages going on and all the other expenses going on, and they were standing there idle doing nothing for an hour or two hours or three hours, or there were breaks and interruptions in the continuity of his work in the one case, then it would be easily understood that under one condition of work it might cost the man $123 to get out one hundred tons, and under the other more favorable conditions of work he might be able to get out one hundred and twenty tons at an aggregate cost of $105."

The vice of this suggestion is that it allows the jury to discard the actual evidence adduced and award damages practically for discrimination in irregularity of car supply, although *there is no evidence whatsoever that in this regard the Coal Companies fared differently from other coal companies in the region; but, on the contrary, affirmative evidence disclosed in the findings of the Commission itself, introduced into the record, shows that there was nothing to indicate that these Coal Companies fared differently from other operators.* Clearly, the charge of the Court was calculated to permit the jury to base its verdict on a supposition which was not only without support in the record, but actually contrary to the facts contained therein. Apparently the trial Judge was under the impression that no matter what evidence might be offered with respect to the findings of the Interstate Commerce Commission, they still were of sufficient weight to preclude him from instructing the jury in accordance with the points submitted by the Railroad.

It is respectfully submitted that, in the light of the decision of this Court in the case of Pennsylvania Railroad Company *vs.* Jacoby & Company, 242 U. S. 89 (1916), it is clearly the province of the trial Court to sustain points such as those submitted by the Railroad, since, just as in the Jacoby case, the Commission's errors are susceptible of mathematical demonstration.

With respect to this feature of the case, the Circuit Court of Appeals said:—

> "The railroad complains, but we think without sufficient warrant, that the trial Judge erred in what he said to the jury in submitting the question how much the cost of mining would have been, if the plaintiffs had received their proper share of cars. We think his instructions were sufficient, and see no occasion to discuss them. Moreover, on this subject the evidence was conflicting, and, since the credibility of opposing testimony was involved the railroad was not entitled to binding instructions. The verdict on this point must be accepted as final."

It is respectfully submitted that neither in the opinion of the trial Court nor in that of the Circuit Court of Appeals is there any answer to the contentions of the Railroad. And, that the principles announced in the Jacoby case justified the Railroad's request for the affirmance of its points, because of the mathematical basis underlying them, will be more fully considered in connection with the next branch of the discussion.

3. THE COURT'S ERROR IN THE MATTER OF THE COMMISSION'S DISREGARD OF ITS OWN RULE OF DISTRIBUTION IN AWARDING DAMAGES.*

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* This point is covered by specifications of error Nos. 7, 8, 9, 10, 11 and 12, in case 294.

This proposition relates exclusively to the second period and is pertinent only to case No. 294.

The rule of distribution prescribed by the Interstate Commerce Commission recognizes four classes of cars, three of which constituting the so-called assigned cars are (*a*) the private or individual cars, (*b*) the cars of foreign railroads sent into the mining region for fuel shipments for the owning companies, and (*c*) the cars placed by the plaintiff in error itself at mines from which it is to receive purchases of coal. The so-called unassigned cars include the remaining cars which are sometimes designated commercial cars. The assigned cars are distributable to the specific mines designated by the owners of the cars without regard to whether the cars so distributed equal or exceed the distributive share to which the mines in question are entitled. This is in accord with the Commission's own rule. According to this rule, the other mine operators are not entitled to share in the distribution of these cars, but only in the distribution of the unassigned cars. Hillsdale Coal & Coke Co. *vs.* P. R. R. Co., 19 I. C. C. 356 (1910), at page 364. (Record, 247).

In its consideration of the Railroad's rule of distribution the Interstate Commerce Commission found but one feature which it condemned, viz., that the assigned cars were counted in reduction of the ratings of the mines which received them, and not in reduction of the distributive share to which such mines would have been entitled. The Commission gave its full sanction to the proposition that the other operators were not entitled in any way to share in the distribution of these assigned cars. Hillsdale Coal & Coke Co. *vs.* P. R. R. Co., *supra* (Record, 235).

Now the undisputed testimony shows that the Commission, disregarding its own rule of distribution, ascertained the additional tonnage on which it allowed damages on the basis of possible profits, by finding the percentage relation between all the cars distributed in the region and the total region ratings, and applying this percentage relation to the ratings of the mine of the Bulah Coal Company.

In support of this statement, the Court's attention is respectfully directed to the testimony of Mr. H. H. Twose, a certified public accountant (pages 129 to 147 of the Transcript of Record). It appears at page 103 that a blue print was offered and received in evidence which is designated Defendant's Exhibit No. 1, and is printed at page 231 of the record. This exhibit had been transmitted to the Commission by Mr. John H. Minds, one of the counsel for the Bulah Coal Company in connection with the case before that tribunal. This blue print purports to show the distribution of cars on the Tyrone Division of the plaintiff in error, the division on which was located the plaintiff's mine. Mr. Twose testified that having examined the report of the Interstate Commerce Commission, he finds that in the first period of the action, which is from June, 1902, to October, 1904, the tonnage which the Commission finds the Coal Company might have mined and shipped with a proper proportion of cars is 36.2 per cent. of its total rated capacity. He further testifies that this is the precise percentage ascertained by taking the average of the percentages shown on Exhibit No. 1 for the nine quarters of this period, which represent the percentage relation of *all the cars in the region* to the total region ratings. Having made a similar calculation for the second period, he finds that the tonnage which the Commission determined the Coal Company might have mined and shipped from its mine was 52.7 per cent. of its rated capacity for this entire period, and that this is the precise percentage ascertained by taking the average of the ten percentages for the ten quarters included in this period as shown on Exhibit No. 1, and that here again the percentage relation is that which exists between all the cars in the region and the total region ratings.

This testimony of Mr. Twose was as follows (pages 129 ff.):—

> "Q. Mr. Twose, you testified yesterday afternoon, as I recall, that in making your examination you had before you the distribution sheets, the report of the Interstate Commerce Commission upon the case, and

the blue print which has been offered in evidence as Defendant's Exhibit No. 1. Is that correct?

"A. That is correct.

"Q. Do you know what the Commission found to be the fair rating of the plaintiff's mine?

"A. Five hundred and sixty tons per day.

"THE COURT:—I suppose the fair rating means that the fair and reasonable business expectation is that if they were fully supplied with cars their output would amount to that much? Is that the idea?

"MR. BIKLE:—I think that is a fair description, your Honor.

"THE COURT:—We will understand it in that way, then, that if they had all the cars which they could use, then their mine equipment was such that they could ship that many tons per day?

"MR. BIKLE:—That is right.

"By MR. BIKLE:

"Q. What did the Commission find would be the fair number of days per month the mine could have worked?

"A. Twenty-two.

"Q. How many months are included in the first period of this case, extending from June 1, 1902, to October 1, 1904?

"A. Twenty-seven months.

"Q. What would the aggregate tonnage be for that period if there was a full supply for every working day?

"A. 332,640 tons.

"Q. What did the Commission find would have been the output with the cars to which the Commission found they would have been entitled?

"A. In this first period?

"Q. Yes.

"A. 120,415.68 tons.

"Q. What percentage is that of the full possible

output of the mines with the supply of cars as first indicated?

"A. 36.2 per cent.

"Q. Is there anything on the blue print which corresponds with that figure?

"A. Yes, sir.

"Q. What is it?

"A. If you take the quarterly percentages shown on the blue print for the nine quarters of that period—that is, the percentage of cars available for distribution to the regional rating—take those nine percentages and add them together and divide by nine, you arrive at your percentage, which I mentioned before, of 36.2.

"Q. That is the average, then?

"A. That is the average.

"Q. Of those percentages?

"A. Of those percentages.

"Q. And those percentages are the percentages that are found in the eleventh column of the blue print?

"A. Yes, sir.

"Q. How is that column headed on the blue print?

"A. 'Per cent. based on division rating.'

"Q. During the second period, extending from October 1, 1904, to June 30, 1907, the Commission's statement as to the fair rating and the number of working days remain the same?

"A. It does remain the same.

"Q. How many months are there in that period?

"A. Thirty-three months.

"Q. What would be the total tonnage with a full output for every working day?

"A. 406,560 tons.

"By THE COURT:

"Q. So we can follow your testimony, Mr. Twose, as we go along, that merely means that taking thirty-three months, twenty-two days in each month, and an output of 560 tons a day, and making a calculation

from those three bases, you get the result 406,560 tons?

"A. Exactly.

"By MR. BIKLE:

"Q. What did the Commission find would have been the output with the share of cars to which the Commission found this mine entitled in this second period?

"A. 214,257.12 tons.

"Q. What percentage is that of the full output which would have been made if they had mined 560 tons for twenty-two days in the thirty-three months?

"A. 52.7 per cent.

"Q. Does that percentage correspond to anything on the blue print?

"A. It corresponds to the column to which I referred, 'Per cent. based on division rating,' for the ten quarters of the period in question. Add those ten percentages together and divide by ten, and you arrive at this percentage, average percentage, of 52.7 per cent.

"By THE COURT:

"Q. Won't you explain right there, in the same way in which you did as to the 332,640 tons and the 406,560 tons, how the other figures of 120,415.68 and the 214,257.12 were reached?

"A. If you take the 332,640 tons for the first period and find the 36.2 per cent. of it you will arrive at the Commission's award, or the figure arrived at in the Commission's award of 120,415.68 tons.

"Q. In other words, that is in the one case 36.2 per cent. and in the other 52.7 per cent. of that first utmost output of the mine?

"A. Exactly."

But, as appears on Exhibit No. 1, the cars in the region were cars of different classes including individual cars and foreign cars, in which, under the Commission's own rule,

the plaintiffs were not entitled to share. Moreover, as will appear from the Commission's report in the Hillsdale case, that company had been specifically denied any right to share in the distribution of these private and fuel cars.

"It is scarcely necessary to add," says the report of the Commission in that case, "that the complainants second request for a finding and for an order requiring the defendant, during percentage periods, to distribute ratably among operators, according to the actual output capacity of their mines, 'all cars adapted to and used for carrying bituminous coal,' whether company fuel cars, foreign railway fuel cars, or private cars, must be denied" (Transcript of Record, page 250).

And as already stated this Report although entitled in the Hillsdale case was treated by the Commission as applicable to all the cases grouped with it.

The Court was accordingly asked to charge the jury that the Commission was bound to follow its own rules of distribution and that the plaintiff was not entitled to share in the distribution of individual cars belonging to other shippers or in fuel cars belonging either to the defendant or to any other railroad company if they were consigned to other mines, and that if the jury was satisfied that the Commission in arriving at the number of cars which the plaintiffs should have received, ascertained the number justly allottable to them, with reference to the percentage which their mine rating entitled them to of the aggregate of *all cars in the region*, regardless of the considerations referred to, the method adopted by the Commission was erroneous and the findings of the Commission were invalid, and no basis for a recovery was offered in this case.

Points Nos. 4, 5 and 6 covered by specifications of error Nos. 7, 8 and 9, refer to this feature of the situation. They are as follows:—

> "4. In determining the number of cars to which the plaintiffs were entitled the Interstate Commerce Commission was not at liberty to disregard the rule of distribution which it had itself promulgated, but

was required to ascertain such number in accordance with this rule.

"5. Under the rule of distribution prescribed by the Interstate Commerce Commission the plaintiffs were not entitled in the period of the action to any individual cars belonging to other shippers or to any fuel cars either of the defendant or of any other railroad company if these were consigned to other mines. The plaintiffs were entitled to their own individual cars and to their just and proper share of the cars which the defendant had available for distribution among shippers.

"6. If the testimony has satisfied the jury that the Interstate Commerce Commission in arriving at the number of cars which the plaintiffs should have received ascertained this number by treating as justly allottable to them the percentage which their mine rating entitled them to of the aggregate of all the cars which were placed by the defendant at the mines in the region in which the plaintiffs' mine was located, regardless of the consideration that there were included in this aggregate a large number of individual cars belonging to other shippers, and fuel cars of the defendant and of other railroad companies, which had been placed at other mines, the method adopted by the Commission for ascertaining the number of cars which the plaintiffs should have received was not in accordance with its own rule and was consequently erroneous, and the finding or conclusion of the Commission as to the number which the plaintiffs should have received was therefore invalid and affords no basis for a recovery in the present action."

The Court refused to give these instructions, and in fact failed entirely to discuss the matter in its charge to the jury. The Court admits that this afforded the Railroad a real basis of complaint (Transcript of Record, page 326), but excuses the "oversight" on the ground that counsel for the Railroad did not call his attention to the omission

from his charge. It is difficult to see the force of this excuse, when it is remembered that specific points were presented covering the question, and when it is noted that, as shown on page 303 of the Transcript of Record, counsel for the Railroad called the Court's attention to the fact that the Commission's finding as to the possible additional tonnage was disputed.

In view of the decision of this Court in the case of Pennsylvania Railroad Company *vs.* Jacoby & Company, 242 U. S. 89 (1916), it is respectfully submitted that the Court erred in failing to charge as requested. In that case, which was treated by the Interstate Commerce Commission as a companion case to these and two other proceedings, the Railroad Company, by testimony similar to that produced in the present proceeding, showed that the Interstate Commerce Commisison had awarded damages not in accordance with its rule, and on the basis of the proportionate share of cars to which the mine operator would have been entitled under the Commission's rule of distribution, but by using a percentage which represented the relationship between the cars delivered to one special mine operator and the ratings of that mine. Upon this evidence, the Railroad Company requested the Court to instruct the jury as follows:—

> "8. If the jury should find that the conclusion of the Interstate Commerce Commission that the plaintiffs in the year ending April 1, 1905, should have received cars equal in capacity to 59.9% of the aggregate of their daily mine ratings, and in the period between April 1 and October 18, 1905, cars equal in capacity to 59.6% of the aggregate of their daily mine ratings, was reached or arrived at because of the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those comprised in the region in which the plaintiff's mine was located had been equal in the earlier period to 59.9% and in the later period to 59.6% of the aggregate ratings of these selected mines,

the basis for the Commission's conclusion and award was an erroneous one, and the plaintiffs consequently are not entitled to recover."

The trial Judge refused this instruction, and its ruling in this regard was held error by this Court. In discussing the point this Court made the following comments, which, we think, are decisive of the present issue:—

"In view of the testimony as we have already stated it, we think the Company was entitled to have this eighth request given in charge to the jury. Nor do we think this refusal was cured by the charge that the finding of the Commission was *prima facie* correct, and entitled to weight as such unless the defendant produced evidence to show that some other state of facts existed, and that the plaintiffs had not suffered the damages awarded to them by the Commission, and the charge in general terms that it was the duty of the Company to apportion and deliver to the plaintiffs their fair share of all cars available during the period of the action to shippers in the district in which plaintiffs' mine was located, and that if plaintiffs received their full and proportionate share of cars in the district they had no cause for complaint against the Company and the burden was upon the plaintiffs to establish by satisfactory proof that they did not receive their share; nor by other parts of the charge in which the jury was told in general terms that the shipper was entitled to recover the full amount of damages which he sustained, and that in arriving at such damages the jury could only take into consideration whether they had been discriminated against, and to what extent they were damaged by that discrimination, and that, if the Berwind-White Company got 59 per cent. of its output when the average allottable was 28 per cent., it did not necessarily follow that the plaintiffs would be damaged the entire difference between 28 per cent.

and 59 per cent., but their damage would be the amount to which their number of cars was reduced in the general allotment by favoring somebody else and taking the cars from them. However correct these general observations may have been, we think it was error in the state of the record to which we have already referred to refuse the specific charge requested.

"It is urged that the testimony before the Commission is not all in the record, and that for aught that appears the Comission may have reached its conclusion and awarded damages upon other and competent proofs, and it is insisted that the coincidence of the amount as awarded and the amount ascertained by the use of the percentages contained in the tables may not necessarily have controlled the action of the Commission. But it is difficult to reach the conclusion that the Commission could have arrived at the result so exactly corresponding with the one obtained by the use of the percentages shown in the tables, except by actually using them to ascertain the sum which is exactly the amount resulting from their application. The Commission might have approximated the same result by using other and legal means to ascertain the damages sustained, but when it is demonstrated that the use of the percentages precisely produces the amount awarded to the dollar and cent, it seems almost mathematically certain that the result could have been reached in no other way. At least, we think that the testimony was in such shape that, as we have already said, the Company was entitled to the specific request upon this subject submitting the matter to the jury."

That the instructions asked for should have been given, has been recognized by the trial Judge himself before whom another case, constituting one of the same group of cases, viz., the case of Clark Brothers Coal Mining Company *vs.* Pennsylvania Railroad Company, was tried shortly after the instant cases and which resulted in a verdict in

favor of the plaintiff there upon rulings similar in principle to those here complained of. The Jacoby decision was handed down by this Court after the trial Judge had refused motions for new trials in the instant cases, but while the motion for a new trial in the Clark Brothers Coal Mining case was still pending. It is of the greatest significance, therefore, that he himself recognized the applicability of the principle announced by this Court in the Jacoby case, and awarded a new trial in the Clark Brothers case.

Clark Bros. Coal Mining Co. *vs.* Pennsylvania R. R. Co., 238 Fed. 642 (1916).

As will be observed, the point submitted in the Jacoby case, after outlining what the jury might find upon the evidence, concluded with a request for an instruction that "the basis for the Commission's conclusion and award was an erroneous one, and the plaintiffs consequently are not entitled to recover," and this Court held that the Railroad Company was entitled to have this instruction given. It therefore follows that if the jury should have found the facts as outlined in the Railroad's sixth point, the answer to which constitutes the ninth assignment of error, the Railroad Company was entitled to a verdict.

But the testimony of Mr. Twose went still further. He explained that he had made an examination of the distribution sheets of the Railroad Company in which were set forth the distribution of cars in the Tyrone region of the Pennsylvania Railroad, from October, 1904, to June 1st, 1907, inclusive, with a view to ascertaining the cars to which the Coal Company was entitled under the Commission's rule (Transcript of Record, pages 104, 133). In view of the fact that under the Commission's rule the mine operator owning cars or having fuel contracts with the plaintiff in error or with other railroads, was entitled to all such cars irrespective of his percentage share, and since other operators were not entitled to share in these cars, and since under the modification of the Railroad's rule made by the Interstate Commerce Commission an operator receiving any indi-

vidual or fuel cars more than his percentage allotment was not entitled at the period in question to share in the commercial cars, it is manifest that, to ascertain the number of cars to which the Coal Company would have been entitled under the Commission's rule of distribution, it would have been proper to exclude from the distribution mines receiving individual and fuel cars in excess of their percentage share, and treat them as though they were no longer in the region. This would necessarily involve, of course, the elimination also of their ratings from the region ratings. This having been done, it would then be possible to ascertain the percentage of the remaining distributable cars to which the plaintiff would be entitled.

Applying the Commission's rule of distribution Mr. Twose shows the result in the Defendant's Exhibit No. 3 (page 233 of the Transcript of Record). The process is explained in detail in the testimony of Mr. Twose, at pages 133 to 147 inclusive. From this statement, it appears that the net shortage during the period extending from October, 1904, to June, 1907, was 392 cars. The gross shortage was 834 cars. Excluding the cars "over" during 1907 the net shortage was 739 cars.

In computing the tonnage represented by these cars, it appears that 25 tons were regarded as representing the loading of a car prior to November 16th, 1905. After that date 35 tons were regarded as the loading of a car (Transcript of Record, page 144).

In the light of this testimony, the Railroad Company presented the following point:—

> "8. The defendant has submitted a statement prepared by a public accountant, purporting to show the number of cars which the plaintiffs would have received if distribution had been made by the defendant in accordance with the rule of the Interstate Commerce Commission. It appears from this statement that the additional cars to which they would have been entitled would not have exceeded 739 cars. Treating each car as having a capacity of thirty-five tons, the tonnage

which could have been transported in these cars would have been 25,865 tons, and this tonnage should be accepted by the jury as representing that which the plaintiffs should have received cars for the shipment of, if the jury believe that the statement prepared by the accountant correctly shows the number of cars which under the Commission's rule of distribution plaintiffs were entitled to receive in addition to those which were actually delivered to them."

The Court refused to affirm this point and its action in this regard constitutes the 11th assignment of error in this case. In view of the decision of this Court in the Jacoby case, the Court's action, it is submitted, was clearly erroneous.

In its opinion dealing with this feature of the case the Circuit Court of Appeals said:—

"In some respects the case now in hand is like Jacoby's case, but it differs in what we regard as a material particular. Laying aside the fact that the present plaintiffs offered other evidence than the commission's findings and orders, we think it important to observe that the principal of each verdict is for a sum considerably less than the principal of the Commission's award, so that the recovery here does not rest on the award alone, but is undoubtedly based on all the evidence touching the subject of the plaintiff's damage. As an award by the Commission is only *prima facie* evidence of the amount of damage, it follows that on the trial in the District Court the railroad may attack the amount, and, if the evidence show that the award is incorrect, the jury should follow the evidence and reject the award. We do not decide the question whether a plaintiff can recover more than the Commission awards, but undoubtedly the railroad may prove that the sum is too large. As the verdicts here demonstrate, the jury did not follow the orders of the Commission, and it seems to us therefore that,

> even if the awards be calculated on the wrong theory, the plaintiffs have not recovered on this theory, but on other evidence, and are not to be charged with the Commission's possible mistake. In the Jacoby case the jury repeated the Commission's mistake precisely, and in this respect the case before us appears to be materially different, for the jury here has rejected the Commission's calculation, and has reached a different result."

It is quite true that there are the differences pointed out by the Circuit Court of Appeals; but it is impossible to perceive how these differences cure the errors of the trial Judge. The "other evidence" offered by the plaintiffs did not tend to show the *correct amount of tonnage* which they were entitled to ship under the Commission's rule. On this point the only evidence offered was the finding of the Commission. But even if there had been other evidence than the finding of the Commission on this point, plaintiff in error nevertheless would have been entitled to the instruction requested which dealt with the evidential value of the finding of the Commission, in view of the erroneous basis upon which this finding was rested.

The fact that the verdicts rendered by the jury were less than the awards of the Commission does not rectify the error, since in the absence of dependable evidence as to the *amount* of tonnage which the plaintiff had been prevented from shipping the jury was not entitled to *guess* at this amount. Moreover, it by no means follows that because the verdict was less than the Commission's award, it should be assumed that the jury were not controlled in arriving at the number of cars which the defendant in error should have received by the Commission's finding. On the contrary, it ought to be presumed that the jury in the absence of proper instructions bearing on this point did not guess at the number of cars which the defendant in error should have received, but based their verdict upon the

finding of the Commission, and that their lower verdict was due to the fact that they used a higher mining cost than the theoretical one of 88 cents which the Commission adopted in arriving at the amount of its award.

The reasons, therefore, which induced the Circuit Court of Appeals to refuse to apply the principle determined in the Jacoby case to the present cases would seem to be wholly unsubstantial.

The analogy between the present case and the Jacoby case is, we submit, complete.

In the present cases and in the Jacoby case it was incumbent upon the respective plaintiffs to introduce testimony from which the jury could find the number of cars which they should have, but had not, received.

In the Jacoby case to sustain this burden the plaintiff put in evidence a finding of the Commission to the effect that the plaintiff should have received so many cars, and introduced no further testimony in chief on this point.

In the present cases precisely the same course was pursued by the plaintiffs, the only testimony introduced by them in chief being a finding of the Commission that so many cars should have been received by them in excess of those which had been received.

In the Jacoby case to overcome the effect of the Commission's finding which had been put in evidence and to discredit or destroy its evidential value, the defendant put in evidence a compilation or statement which had been submitted to the Interstate Commerce Commission by the plaintiff, which purported to show the number of cars which certain mines located on the line of the defendant had received in the period of the action and the percentage relation between the aggregate capacity of these cars and the aggregate capacity or rating for car distribution purposes of the mines at which they had been placed, and they followed this by testimony that the percentage relation between the capacity of the cars which the Commission found Jacoby should have received and the capacity or rating of his mine corresponded exactly with the relation between

the capacity of the cars and the capacity of the mines which had been embraced in the statement submitted.

In the present cases the defendant pursued precisely the same course as that which had been pursued in the Jacoby case. It put in evidence a statement which the plaintiffs in the proceedings before the Commission had submitted as the basis of their claim, which showed the aggregate number of all cars placed in the region in which their mine was located and the percentage relation between the capacity of these cars and the capacity or rating of the mines at which they had been placed, and the introduction of this statement was followed by testimony showing that the percentage relation between the capacity of the cars which the Commission found the plaintiffs should have received and the capacity or rating of their mine was exactly similar.

The point presented in the Jacoby case, which this Court said should have been granted finds its true counterpart in the points submitted in this case on behalf of the Railroad (*supra*, page 47).

If there was evidence, and there undoubtedly was, from which the jury would have been justified in finding that the Interstate Commerce Commission had ascertained the number of cars which the plaintiffs should have received in the manner referred to in the point (and the evidence that they had thus determined the number was uncontradicted) and, if such method was an erroneous one (and we do not understand that it is now contended that the plaintiffs were entitled to a percentage of the aggregate of all the cars placed in the region because these included individual and fuel cars, to none of which the plaintiffs were entitled), then it would seem inevitably to follow that the decision or ruling of this Court in the Jacoby case is directly applicable and controlling.

That this was the view of the trial Judge is evidenced by the action which he took in Clark Brothers Coal Mining Company *vs.* The Pennsylvania Railroad Company, *supra*.

The Circuit Court of Appeals has, we respectfully submit, fallen into error in assuming that any other testimony than

the finding of the Commission was introduced by the plaintiffs which would have enabled the jury to determine the number of cars to which the plaintiffs were entitled under the rule of distribution laid down by the Interstate Commerce Commission. The plaintiffs introduced no testimony whatsoever which would have enabled the jury to determine the number of *distributable* cars which the plaintiffs should have received. There was some testimony which showed the number of cars which another operator had received, but that this did not tend in the remotest degree to establish the number which the plaintiffs were entitled to is settled by the decision of this Court in the Jacoby case. The Railroad introduced testimony with respect to this feature of the case, the testimony of Mr. Twose alluded to above (*supra*, page 37); but the Court refused to instruct the jury with respect to the significance of this testimony and in fact it is in large measure the treatment accorded this testimony by the Court which the Railroad complains of as constituting error.

As to the second ground of differentiation between the Jacoby case and the present cases, viz., the difference between the amount of the Commission's award and the verdict in the present cases and the exact correspondence between the two in the Jacoby case, it should not, we submit, have the effect given to it by the Court.

In the first place, if it be true, as we submit it is, that there was no evidence at all from which the jury could determine the number of cars to which the plaintiffs were entitled, if the award of the Commission was not evidence of this, then no verdict in favor of the plaintiffs was justified. And even if this is not the case and there was other evidence, nevertheless, the defendant was entitled to the benefit of an instruction that, if they found that this finding was based upon an erroneoeus method of ascertaining the number of cars to which the plaintiffs were entitled, they should ignore this finding in arriving at their conclusion.

Moreover, the variance in the present cases between the amount awarded by the Commission and the verdict of the

jury is deprived of all significance when it is considered that the amount of the verdict is no evidence that the jury ignored the Commission's finding as to the number of cars which should have been delivered to the plaintiffs, because this finding may have been accepted and adopted and the Commission's award may not have been accepted because of the testimony adduced tending to show that the Commission, in arriving at the profit which the plaintiffs would have made on the coal which they were unable to ship, had seriously underestimated the cost of producing the same.

It is proper to point out also that in the Clark Brothers case, tried before the same trial Judge shortly after the trial of these cases, there was a large amount of evidence introduced by the plaintiff, in addition to the report and order of the Interstate Commerce Commission, and the verdict rendered was for the face value of the claim without interest, which made a reduction of about one-third in the sum which would have been recoverable if the jury had allotted the full amount of the Commission's award with interest. This is just about the reduction made by the jury in these cases. It follows, therefore, that in the two matters which the Circuit Court of Appeals refers to as distinguishing this case from the Jacoby case the Clark Brothers case was an exact parallel. Notwithstanding this, the trial Judge, as heretofore stated, ordered a new trial because, as indicated in his opinion (238 Fed. 642) the decision of this Court in the Jacoby case, in his judgment, required it.

Furthermore, counsel respectfully but earnestly insist that the suggestion in the opinion of the Circuit Court of Appeals that this contention was waived results from a misapprehension.

In connection with the discussion of the points submitted by both sides, the trial Judge, Judge Dickinson, announced that he did not intend to make a specific answer to each point, but that he purposed to deal with the case comprehensively in his charge and then to state at the end of his charge that, so far as the points were affirmed, by the instructions in his charge, they were affirmed, and, in so far

as they were refused by the instructions in his charge, they were refused. This procedure was followed, as appears at the conclusion of the charge, at page 302 of the Record, where the Court says:—

> "I think I have gone over the subject matter of the different points submitted to me. So far as they are affirmed in the general charge, they are affirmed; and so far as not affirmed in the general charge, they are disaffirmed, and counsel, if they choose, may call my attention to any specific point which they would like to have specifically answered."

As readily appears from a reading of the charge, the trial Judge disagreed with the theory of defendant's counsel with respect to the points under discussion and intended to refuse them, and there was no reason, therefore, why counsel should have called his specific attention to the points relating to this feature of the case in order that he might announce such refusal; particularly in view of the initial statement made by the Court that he did not intend to answer the points specifically, and in view also of the generally approved practice not to read to the jury points which are refused. Due exceptions were taken, as appears on page 304 of the Record, as follows:—

> "Counsel for the defendant except to the refusal of the learned trial Judge to charge as requested by them in such points as were not affirmed."

The refusal of these points was included as one of the grounds for the Railroad Company's motion for a new trial; but an additional reason was assigned, viz., that the Court's charge was inadequate in failing to discuss the testimony of Mr. Twose—the testimony as to the inaccuracy of the Commission's award. Even, on the theory of the trial Court, the Railroad was entitled to have this feature of the case explained to the jury, and this the Court had entirely omitted to do—through inadvertence as he has stated.

In his first opinion denying the Railroad Company's motion for a new trial, he says, with respect to the 16th reason for a new trial which dealt with this matter (Record, page 326):—

> "The remaining sixteen reasons are really duplications of those discussed (being stated separately in each case), except the sixteenth. This complaint has a real basis. We would not, however, feel justified in subjecting the parties to the delay and expense of a new trial because of the inadequacy of the charge in this feature. The reason is this: The testimony referred to was that of an intelligent and fair witness with a firm grasp of the facts to which he testified. These were all book-keeping or mathematical facts, as he had no knowledge except that derived from the figures submitted to him. The trial Judge had in mind the definite purpose to advert to this testimony and its application to the case, but he was diverted from this purpose and it was forgotten. Counsel for defendant were in no way responsible for this lapse and their client should not suffer for it. Nevertheless, the fact is they did not call attention to the oversight. Neither was it the fault of the plaintiffs and they are in no default and the loss should not fall on them."

Clearly, therefore, the trial Court did not intimate that there had been any waiver on the part of the Railroad Company of the position taken by it, except as to this complaint *that the charge was inadequate* in the matter referred to. But to make assurance doubly sure, counsel for the Railroad Company called his attention to the danger of a misunderstanding of the language used, and he at once indicated that he had not intended to create the inference that there had been any waiver of the position taken by the Railroad Company *in its points* and expressed his entire willingness to file a supplemental opinion, which he very promptly prepared and filed on November 8th, 1916. This opinion appears on pages 327 to 329 of the Record, and is,

it is submitted, conclusive confirmation of the correctness of the Railroad's contention that it in no respect waived any of the positions covered by its points.

The Court's attention is respectfully called to the following paragraph of this supplemental opinion on page 328 of the Record:—

> "The other error was the inadequacy of the charge in the respect that it presented to the jury the evidence of the amount finding of the Commission, but their attention was not called to the testimony of the witness for the defendant. In saying that the defendant had waived specific answers to the points referred to, we meant merely that the charge of the Court was intended and accepted as an answer to these points, affirming them so far as the charge was in accord with them, and disaffirming them otherwise. We did not mean to imply that counsel had abandoned in any degree the contention of the defendant."

Furthermore, it should be noted that the Record shows on page 304 that an exception was noted for the defendant by direction of the Court because of the refusal of the trial Judge to charge as requested by defendant's counsel in such points as were not affirmed; and, as appears on page 307, an exception for the defendant was also noted by direction of the Court because of the defendant's complaint of the inadequacy of the Judge's charge. It is difficult to believe that the Court would allow an exception to the defendant if in the Court's opinion the defendant had waived the points with respect to which the exception is allowed.

4. INTEREST.*

The Railroad Company also claims that no interest should be allowed on the amount demanded. The original claim as stated in the Commission's findings was the exorbitant sum

* This point is covered by specifications of error Nos. 5, 8, and 9, in case 293, and specifications of error Nos. 5, 14 and 15, in case 294.

of $155,401.59. The Commission awarded less than one-third of this amount, even on a basis which, as has been shown, was clearly excessive. The jury cut down the principal amount of the Commission's finding by $15,000. Under these circumstances, it is respectfully submitted that there is no proper basis on which interest can be claimed.

Thus in the case of Stevenson *vs.* Ebervale Coal Company, 203 Pa. 316 (1902), where the plaintiff claimed $100,000 and recovered $21,000, the Supreme Court of Pennsylvania, referring to the exorbitant demand which had been made, said (page 333):—

> "The jury should have been peremptorily instructed, that under these circumstances damages for detention, not to exceed legal interest, should not be allowed; that they had no discretion in the matter."

See to the same effect, Pierce *vs.* Lehigh Valley Coal Co., 232 Pa. 170 (1911). In this case, the Court says on page 172:—

> "The right to compensation for delay in the payment of damages arising out of a *tort* depends upon the circumstances of the case. It is, therefore, usually a question for the jury under the evidence submitted. If the fault, in non-payment of the claim rests with the defendant, he cannot complain if he is required to compensate for the delay. If on the other hand the fault lies with the plaintiff by reason of an excessive and unconscionable demand, one which the defendant is required to protect himself against by litigation, he should not be penalized for the unwarranted conduct of the plaintiff and required to pay damages for the delay in the settlement of the claim. The Court should so instruct the jury, and if they disregarded the evidence and wrongfully return a verdict awarding compensation for the delay, the Court should set aside that part of the verdict where the amount can be ascertained, and if it cannot be ascertained the entire verdict should be

set aside and a new trial awarded. If it is clearly developed on the trial of the cause that the claim is extravagant and unreasonable and warranted the defendant in resisting payment, the Court should direct the attention of the jury to the evidence with instructions that if it is credible the plaintiff would not be entitled to recover compensation for the delay."

See also in support of the same proposition:—

Trustees of Kingston *vs.* Lehigh Valley Coal Co., 241 Pa. 469 (1913).

The learned trial Judge not only permitted the jury to award interest from the date of the Commission's award, *but from a date almost five years antecedent thereto,* when the plaintiffs were claiming three times as much as the Commission awarded. In this connection it is to be remembered that had the Railroad acceded at any time during these five years to the unconscionable demands of these plaintiffs, it would, in the light of the Commission's findings, even if they were correct, have been guilty of an undue preference in violation of the provision of the Act to Regulate Commerce.

5. Award of Counsel Fees.*

In case No. 293, relating to the first period, the learned trial Judge awarded a counsel fee of $3250, while in case No. 294, relating to the second period, he awarded $6750. In doing this, he confessedly took into view the services rendered by counsel before the Interstate Commerce Commission. While he professes to exclude an allowance on account of proceedings before those taken in Court (Transcript of Record, page 330), the following paragraph of the opinion filed in connection with the allowance of these fees

* This point is covered by specifications of error Nos. 12, 13 and 14, in case Nos. 293, and specifications of error Nos. 18, 19 and 20, in case No. 294.

(Transcript of Record, pages 330 to 332) clearly indicates that the fee was made with reference to the services of counsel before the Interstate Commerce Commission as well as in connection with the institution and prosecution of the present action, and that it was not restricted to the services of counsel rendered in connection with the initiation and prosecution of the case in the District Court. Of course, it is settled that no fee is payable under the act because of the services of counsel before the Commission: Meeker *vs.* L. V. R. R. Co., 236 U. S. 412 (1915), at pages 432 and 433. The evident purpose of the statutory provision, the Court says, is to charge the carrier with the cost and expenses entailed by its failure to pay without suit (see also Mills *vs.* L. V. R. R. Co., 238 U. S. 473-1915). If, however, the trial Court is permitted to take into view the services rendered before the Interstate Commerce Commission in determining the compensation to be paid on account of services in the District Court, it is manifest that the rule established by this Court is evaded. Furthermore, the purpose of the rule, as outlined by this Court in the Mills case, is to place upon the Railroad Company the burden of the cost of litigation after the case passes the Interstate Commerce Commission if the railroad ultimately loses, and this clearly implies that the Railroad Company should only be required to pay such counsel fees as might reasonably be charged by counsel for the defendants in error to their clients for services in the District Court in addition to the fees properly chargeable if the case had never been carried beyond the Commission. Obviously, the procedure of the learned trial Judge runs directly counter not only to the rule of law, but also to the purpose which lies back of it.

Furthermore, the trial Judge is without the requisite knowledge to enable him to determine what the amount of the fee is to be if it is to be predicated in any way on the services rendered before the Interstate Commerce Commission. Since he was not present at the hearings before that tribunal, and has taken no evidence of the time and labor involved in the preparation of the case, the rule suggested

by him would result in the fixing of a fee without evidence upon which to base it. This could never have been contemplated by the statute.

Finally, it is respectfully submitted that in any aspect the fee is excessive for the services rendered in the District Court, even taking into consideration the preliminary services before the Interstate Commerce Commission.

HENRY WOLF BIKLÉ,
FREDERIC D. McKENNEY,
FRANCIS I. GOWEN,
For Plaintiff in Error.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1918. NOS. 293 AND 294.

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

James H. Minds, Surviving and Liquidating Partner of James H. Minds and William J. Matz, lately trading as Bulah Coal Company, Defendants in Error.

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

James H. Minds and Julia A. Matz, Co-partners trading as Bulah Coal Company, Defendants in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR DEFENDANTS IN ERROR.

COUNTER STATEMENT OF THE CASE.

During the period of the action from June, 1902, to June, 1907, the Bulah Coal Company operated a mine known as Webster No. 4, in the County of Clearfield, State of Pennsylvania. The Bulah Coal Company was a copartnership, composed of James H. Minds and William J, Matz. William J. Matz died in April, 1904, testate, leaving to survive him his widow, Julia A. Matz, as executrix and sole legatee under his will. The action originally begun before the Interstate Commerce Commission was brought in the name of the Bulah Coal Company, but on account of the death of William J. Matz it was divided into two periods. During both periods coal was produced from but the one mine, to wit, Webster No. 4.

On the twenty-eighth day of June, 1907, the proceedings were begun before the Interstate Commerce Commission, and as a result of the hearing and a rehearing for further argument the Commission handed down certain findings of fact and reparation awards covering both periods of the action. On February 7th, 1913, two petitions were filed in the United States District Court for the Eastern District of Pennsylvania, bringing suit upon the awards in both periods of the action. Through an error the docket numbers and the amounts of the wards in the two cases were erroneously transposed. On November 9th, 1915, both cases were called for trial and consolidated by agreement of counsel. A jury was empannelled and the testimony of both sides formally presented. Respective counsel argued the case to the jury, and after arguments the trial Court discovered the erroneous transposition. At this time it was suggested that an immediate amendment be made and the cases submitted to the jury under one charge for verdict. The Railroad Company objected, a juror was withdrawn and the case continued. The cases were again called in said Court on October 9th, 1916, and were again consolidated for trial. The Coal Company offered in evidence the award of the Commission, and also read in the Record the testimony of James H.

Minds and Elias C. Davis, witnesses who had an intimate and direct knowledge of the subject matter involved.

The Railroad Company produced three witnesses, all of whom testified largely upon the assumed state of facts from figures, statements and records furnished them by the Railroad Company. This testimony of the Railroad Company was offered for the purpose of contradicting the testimony of the Coal Company.

The Railroad Company admitted its liability to the Coal Company, in both periods of the action, but attacked the evidence produced by the Coal Company in but one feature, involved in the first period, and that was the question of the hypothetical cost of production, provided the Coal Company had received a non-discriminatory supply of cars under its rated capacity.

In the second period the Railroad Company admitted its liability for discrimination in the amount of 25,865 tons, but contended that the tonnage upon which the Commission had made its calculations was erroneous alleging that the Commission had disregarded its own rule of distribution. The Railroad Company did not offer in evidence any formal rule of distribution, authorized by the Commission, but relied upon the Commission's discussion of what the proper rule should be in an opinion filed in another case. The cases were submitted to the jury, which found a verdict in favor of the Coal Company of $10,990.11, with compensation for delay, for the first period, and $22,958.10, with compensation for delay, for the second period, the aggregate total of these verdicts being exactly $16,358.84 less than the aggregate amount of the awards sued upon.

ARGUMENT.

That the Coal Company was unduly discriminated against by the Railroad Company in the distribution of coal cars, cannot be controverted. It is the law of the case, and, therefore, the adjudicated premises upon which the instruc-

tions of the Court and deductions of the jury under the testimony must be based. The plaintiff in error stands convicted of an undue and unjust discrimination against the defendants in error by reason of the enforcement of the rule of the plaintiff in error then in effect regulating the distribution of coal cars. The plaintiff in error, as a matter of fact, does not deny that the defendants in error are entitled to recover damages in both periods of the action, but contends that the verdicts rendered by the jury are excessive in amount.

There is substantive merit in the defendants in error's case. That the Coal Company has been wronged by the Railroad Company is admitted, but nowhere in the Record is there a scintilla of testimony of any amount ever tendered by the Railroad Company to the Coal Company as compensation for the damages sustained many years ago by the Coal Company by reason of the Railroad Company's undue and unjust discrimination against them in giving cars. It must be remembered that the Coal Company since June 28th, 1907, sought redress for its wrongs. The Railroad Company, ably represented by counsel, opposed the contention of the Coal Company and after considerable testimony taken on both sides, the Interstate Commerce Commission on August 18th, 1910, ordered:—

> "That the said rule, regulation and practice of the defendant in that behalf unduly discriminates against the complainant and other coal operators similarly situated, and is in violation of the Third Section of the Act to Regulate Commerce."
>
> (Page 37, Transcript of Record.)

No order for reparation was made at this time, and further argument was directed by the Commission (Transcript of Record, page 35). Again the Railroad Company had another opportunity to enlighten the Commission along the lines defended by it in the cases at bar. Following argument on March 11th, 1912, the Commission handed down reparation orders awarding to the defendants in

error during the first period the sum of $18,591.48, with interest thereon at the rate of six per cent. per annum from June 28th, 1907, and for the second period the sum of $31,715.57, with interest thereon at the rate of six per cent. per annum from June 28th, 1907. As a result of suits brought in the District Court on these awards, the juries returned a verdict of $10,990.11, with interest from June 28th, 1907, covering the first period, and $22,958.10 covering the second period. Regardless of interest, which runs concurrently with the awards and at the same rate, and beginning with the same period of time, the verdicts reduced the amounts awarded in a total aggregate of $16,358.84, as the following statement indicates:—

Amount of award, first period		$18,591.48
Amount of award, second period		31,715.57
		$50,307.05
Verdict, first period	$10,990.11	
Verdict, second period	22,958.10	
Total deductions on awards	16,358.84	
	$50,307.05	

1. RIGHT OF DEFENDANTS IN ERROR TO AMEND.

To deny the right to amend for the purposes of correcting formal defects and inadvertent mistakes would impart a rigor to the law incompatible with the spirit of justice that animates our Courts in the impartial performance of their high duties. To allow amendments is the rule; to refuse, the exception. Liberality in the allowance of amendments largely prevails, and the tendency of the Courts to exercise their discretion in this regard is daily becoming broader in scope and more elastic in purpose. The defendants in error operated the same mine at two different but consecutive periods. For the purposes of trial both cases were consolidated. As stated in the petition to amend, the changes made and allowed by the Court introduced no

new cause of action, involved no new person or persons, claimed no new amount or amounts of damage, but merely substituted one amount and docket number for the other, as the record plainly shows. It might be pertinent to say that at the first trial, so immaterial and slight was the technical error or variance that neither the counsel for the Railroad Company nor for the Coal Company detected it. After all the evidence was in, and the closing arguments to the jury had been made on both sides, the trial Judge discovered the error, advised counsel of the same, and it was suggested that an immediate amendment be then and there allowed. The counsel for the Railroad Company objected to the proposed allowance and a mistrial resulted. After the amendments had been regularly allowed, the case was again called for trial. It was before the same Judge in the same Court, with the same attorneys participating on both sides, the record showing that "counsel agree that the two cases may be submitted to the same jury on the same testimony" (page 67 of the Transcript of Record). At the very opening of the case the trial Judge said to the jury:—

> "THE COURT:—Gentlemen of the jury, there are two cases being submitted to you. It is necessary for the reason given you that there be two cases, because the parties claimant are not precisely the same in each case, but each case grows out of the same transaction. The cases will be supported by the same evidence, by the same witnesses, so for the convenience of all concerned, we are submitting both cases to you at the same time, but when you come to make the awards you will separate them and render your verdict in each case as though that were the only case submitted" (Transcript of Record, page 67).

In its argument the plaintiff in error is compelled to state:

> "In these two cases, which were consolidated for the purposes of trial, the issues are so similar that it

has seemed not only practicable but desirable to discuss them in one brief" (Brief of Plaintiff in Error, page 22).

These two suits constitute only one cause of action. This cause of action was divided into two periods, the first thereof ending and the second thereof beginning with the date of the death of one of the partners. Without the amendment neither the Railroad Company nor the Coal Company would have suffered any injustice, and it is submitted that with the amendment allowed their status in this regard is not changed. The Bulah Coal Company, was originally comprised of James H. Minds and William J. Matz. William J. Matz, one of the partners, having died, his widow, Julia A. Matz, being executrix and sole legatee under his will, continued the partnership with James H. Minds. The plaintiff in error makes much ado in its contention that the proposed amendment introduced a new cause of action in contravention of the last sentence of paragraph 2 of Section XVI of the Act to Regulate Commerce, which states "that a petition for the enforcement of an order for the payment of money shall be filed in the Circuit Court or the State Court within one year from the date of the order and not after." The case of Phillips & Company *vs.* The Grand Trunk Western Ry., 236 U. S. 662 (1915), is quoted in support of this position. In this case a lumber association petitioned the Interstate Commerce Commission for its determination as to the reasonableness of an advance in freight rates on lumber. Its petition was filed July 24th, 1903. It was held that the advance was not warranted, and that the resultant increase was unreasonable and unjust. The action of the Commission was sustained by the Circuit Court, and on May 27th, 1907, its ruling was affirmed by the United States Supreme Court. *Nearly two years after the ultimate decision rendered by the United States Supreme Court,* the plaintiff in the case noted by the plaintiff in error brought suit in a Circuit Court for the recovery of the overcharge. One of the basic allegations in the plead-

ings was that the Commission on complaint of the lumber association, to which Phillips and Co., the plaintiff, was a total stranger, had found the overcharge to be unreasonable. The United States Supreme Court held under these facts that the lapse of time was fatal to the claim of the plaintiff. In the case cited, plaintiff could have protected his rights in any one of three ways: he could have filed a complaint; interevend in the petition already filed by the association; or, if in time, persented his claim and awaited the result of the litigation over the validity of the order. His main difficulty was that he presented no petition whatever within the time limit. Our petitions were filed in the District Court within the statutory time, and they were both filed upon the same day. They were based upon companion reparation orders handed down together, grounded upon the same evidence. No new party was introduced. James H. Minds and Julia A. Matz were the only two persons interested, either in a personal or representative capacity before amendment, and they remained in identically the same capacity after amendment. Had the trial, at the time of withdrawing the juror, proceeded to verdict, and had the trial Judge or no one else discovered the technical misplacement of the figures representing the docket numbers and the amounts involved, no possible injustice arising from the unamended condition of the Record would have resulted to the plaintiff in error. In the event that this verdict had been obtained, and it came to payment of the same or satisfaction of the record, no other signatures to the release or satisfaction in either or both cases could be required than those of Julia A. Matz and James H. Minds. If the plaintiff in error today, in case the ultimate decision in these cases was against it, were required to pay the verdicts in either or both cases, again the only signatures necessary to fully release it in any event would be those of Julia A. Matz and James H. Minds. The interest of James H. Minds continues throughout both periods of the action, while by the death of William J. Matz, the other partner, his wife became his executrix and sole legatee. It has been well settled

that an amendment which merely explains or amplifies what was alleged in support of the cause of action, asserted in the original complaint, relates back to the action and is not affected by the intervening lapse of time. The change in the case at bar was in form and not in substance. It introduced no new party nor different cause of action, nor does it set up any different set of facts as the ground of the action. The changes made clearly were not of the essence of the cause of action, and could in no wise have prejudiced the defendant. The defendants in error can find no apter words in answer to the contention of the plaintiff in error than those contained in a happy comment made upon the questions of amendment and technical pleadings by Judge Caldwell, in the Circuit Court of Appeals, delivered in the case of McDonald *vs.* State of Nebraska, 101 Federal Reporter 182 (1900):—

> "There are in the history of the jurisprudence of every country certain epochs which mark the beginning of distinct trains of legal ideas and judicial conceptions of justice. There was a time in England and in this country when the fundamental principles of right and justice which Courts were created to uphold and enforce were esteemed of minor importance compared to the quibbles, refinements, and technicalities of special pleading. In that period the great fundamentals of the law seemed little, and the trifling things great. The Courts were not concerned with the merits of a case, but with the mode of stating it. And they adopted so many subtle, artificial, and technical rules governing the statement of actions and defenses—for the entire system of special pleading was built up by the judges without the sanction of any written law—that in many cases the whole contention was whether these rules had been observed, and the merits of the case were never reached, and frequently never thought of. Happily for mankind, and for the law itself, that epoch is past in England and in this country, and we now have an epoch in which substance is more considered than

form, in which the justice and right of the cause determines its decision, and not some technical error or mistake in the pleadings. In England today the amendment complained of in this case would be allowed quite as a matter of course, and the suggestion that the defendant had gained some advantage by the mistake would not be entertained for a moment. There, as here, every error or mistake in the pleadings which does not affect the substantial rights of the adverse party may be cured by amendment; and what is meant by substantial right is a right going to the actual merits of the case. Such a right is not acquired by a mistake or error in pleadings which has not misled the other party to his prejudice. And the prejudice must be actual and irreparable, and not merely theoretical. At this day the party who seeks to profit by an error or mistake in pleading must be able to invoke the principle upon which the law of estoppel is founded. And the emotion of surprise, once so assiduously cultivated by lawyers, has lost its virtue. Extreme sensitiveness to that emotion no longer avails to turn a suitor out of Court, or to delay justice."

In the case of Samuel D. Hall *vs.* The Pennsylvania Railroad Company, brought in the Court of Common Pleas No. 5, of Philadelphia County, No. 4858, June Term, 1906, and upon appeal to the Supreme Court of Pennsylvania, thereafter having been formally heard and then reargued, the Court in 257 Pa. 54 held that where plaintiff claims $100,000 damages as excess charges on coal shipments in violation of constitution and statutes passed in pursuance thereof, and subsequent amendment alleged acts were in violation of constitution and statutes, and "particularly Act of June 4th, 1883, P. L. 72," which relates to treble damages, an amendment offered more than six years after cause of action arose claiming treble damages, does not introduce new cause of action, since first amendment referring to the Act of 1883 was sufficient to notify defendant that action

was brought to recover penalty imposed thereby, though no express claim for treble damages was made.

As to allowance of amendment six years after cause of action and three years after the date of beginning of suit, see Puritan Coal Mining Company *vs.* The Pennsylvania Railroad Company, 237 Pa. 423, vide 460.

That the Court below was amply justified in allowing the amendment is sustained by Section 954 Rev. Statutes of the United States, Federal Statutes Annotated, Vol. 4, page 596:—

> "No summons, writ, declaration, return process, judgment, or other proceeding in civil causes, in any Court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such Court shall proceed and give judgment, according as the right of the cause and matter in law shall appear to it, without repairing any such defect, or want of form, *except those which,* in cases of demurrer, the party demurring specially sets down, together with his demurrer as the cause thereof; and such Court shall amend every such defect and want of form other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleading, upon such conditions as it shall, in its discretion, and by its rules prescribe."

Purpose of the section:

The jurisdiction has been conferred by Acts of Congress upon the Court of the United States, so as to supervise the various steps in a cause to prevent hardships and injustice, and that the merits of a cause may be fairly tried.

> Eberly *vs.* Moore (1860) 24 How. U. S. 147;
> *In re Glass* (1902) 119 Fed. Rep. 509.

The Circuit Court of Appeals, in passing upon this specification of error, said (Transcript of Record, page 345):—

> "As we understand, however this position is not much relied on, and in any event we see no reason to say anything about it except to approve the action of the District Court in setting right what was a plain and harmless mistake. Its correction did the Railroad no possible injury."

In addition to the Phillips case the plaintiff in error has cited four cases (Brief of plaintiff in error, page 25), to support its contention that the District Court erred in allowing the original petitions in this case to be amended:—

> Georgia, etc. Ry. *vs.* Blish Co., 241 U. S. 190 (1916), at page 197;
> M. K. & T. Ry. Co. *vs.* Ward, 244 U. S. 383 (1917), at page 388;
> U. S. *ex rel.* Louisville Cement Co. *vs.* I. C. C., 246 U. S. 638 (1918): cf.;
> B. & O. *vs.* Leach, No. 132, Oct. T., 1918, decided Mar. 10, 1919.

A careful examination of these cases fails to show that in any instance the question of amending the record was before the Court; and it is therefore submitted that they have no bearing whatever on the question in the case at bar as to the right of the District Court to correct an error in the pleadings, the allowance of which could work no possible harm to the plaintiff in error.

2. INSTRUCTIONS GIVEN BY THE COURT WERE FAIR, ADEQUATE AND PROPER AS TO AVERAGE COST OF PRODUCTION.

The contention of the plaintiff in error in reference to the average cost of production which would have been incurred had the defendant in error been furnished with the additional cars to which the Commission found they were entitled, is without merit. The plaintiff in error admits upon a proper construction of its own evidence alone that in neither period of the action did it give the defendants

in error the number of cars to which they were entitled under the law of the case. This implies also the further admission, as a matter of fact, that the defendants in error were entitled to a verdict in both periods. The only remaining question undecided was the amount of the verdict in these cases.

In the first period, it is admitted that the Commission's figure of 9523.68 lost tons is correct, the only disputed question being the cost.

> "MR. BIKLE:—In the first period we do not dispute the lost tonnage, only the cost. * * * ." (Record, page 303.)

Having in mind that the lost tonnage and average selling price of coal are not in dispute during the first period, the defendants in error submit that the hypothetical cost involved is solely for the jury. The charge of the Court was so fair and adequate on this question and applies to both periods that we feel constrained to quote a portion of it:—

> "Now, the next question is what did it cost to produce. There is the controversy between these parties. That is the fact, the simple fact, which you are to decide. During that period, 1902 to 1904, what was the fair cost for producing this coal? The plaintiff says it was eighty-eight cents, and they point to the evidence—and I do not care to take the time to go over it, because it is unnecessary; it has been fully and ably discussed by counsel, and that argument was addressed to you by the plaintiff for the purpose of convincing you that the fair cost of the production of that coal during that period was 88 cents a ton. If it was, then the difference between $1.598 and 88, or 71.8 cents is the profit, and if that is the right figure, then of course every man's common sense would tell him to just multiply that by 3,878.4 tons, and you would have that element of damage resulting in $2,784.41.
>
> "Now, of course, gentlemen, in every case you are not done with it when you hear one side. You get

that one clearly in your minds. That is perfectly simple and perfectly clear, and that the question for you to consider is 'What was the fair cost of producing this coal? I have given you what the plaintiff says about it. Now, the defendant says that that is too low; that it could not have been produced for that; that they could not have received as large a profit as 71.8 cents on every one of these tons. That it would have been less than that; and they say—and that was the purpose of calling Mr. Hatfield as a witness before you—he says that the fair cost instead of being 88 cents was $1.19, and while it is admitted that there was a profit, and admitted that there was a damage, the profit and consequent damage was not 71.8 cents but it was 40.8 cents a ton, and the plaintiff is entitled to only the profit in this feature of the case, then of course the damage would not be 3878.4 tons multiplied by 71.8 cents, but it would be 3878.4 tons multiplied by 40.8 cents, and the amount would be $1582.22 as against $2784.41. I think, gentlemen, that that is clear." (Record, pages 294-295.)

To assert that the portion of the trial Judge's charge, quoted on pages 33 and 34 in the Argument contained in the Brief of the Plaintiff in Error, had a tendency to or did allow the jury to discard the actual evidence adduced and award damages practically for discrimination in irregularity of car supply, absolutely distorts the fair meaning of the quotation, which makes no reference to the question of discrimination at all. It was perfectly proper for the Court to state to the jury that an irregular supply of cars for coal shipment made the actual cost of production higher per ton than would a regular supply under similar labor conditions, as bearing on a material feature of the case which the jury had to find from the evidence, to wit, the actual cost of production in both periods under an admitted discriminatory supply of cars. The Court also had before it the testimony of James H. Minds and Elias C.

Davis, which was read into the record, corroborating the force of the evidence created by the admission of the findings and orders of the Commission. How similar is the plain meaning flowing from that portion of the trial Judge's charge quoted by plaintiff in error and the meaning that can be adduced from substantial testimony introduced by defendants in error from the findings of the Commission:—

> "'(e) That the cost of production at the complainants' mine during the first period was $1.23 per ton on the average, and during the second period $1.08; that the cost of production would have been 88 cents per ton during both periods if a non-discriminatory share of the car supply had been received, and that the excess in the actual costs of production of the coal mined and shipped to interstate destinations resulting from the discrimination in the car supply was therefore 35 cents per ton during the first period and 20 cents during the second period.'" (Record, pages 72, 73.)

The defendant in error might reasonably complain of the inadequacy of the Court's charge so far as the testimony of James H. Minds and Elias C. Davis is concerned. The testimony of these witnesses was not only highly corroborative of the orders and findings of the Commission in certain essentials, but the testimony of Mr. Davis, if believed, would have warranted the jury in finding that instead of twenty-two days constituting an average working month, the mine could have worked twenty-six days per month, and that the hypothetical cost would have been 83 cents instead of 88 cents for both periods.

> "MR. ROADS:—What is your business?
>
> "MR. DAVIS:—Bookkeeper and shipping clerk.
>
> "MR. ROADS:—Shipping clerk for the Bulah Coal Company?
>
> "MR. DAVIS:—Yes, sir.
>
> "MR. ROADS:—How long have you occupied that position?

"MR. DAVIS:—About eighteen years.

"MR. ROADS:—Did you make a table, computed from data that was kept by you, in regard to the capacity of the Bulah Coal Company's operation at Webster No. 4, showing the number of working days, the capacity at all times based upon 16 cars rating per day, showing the actual output, the loss in tons, the average price of coal, the average cost of production, the loss per ton, and the total loss between 1902 and June, of 1907?

"MR. DAVIS:—Yes, sir.

"MR. ROADS:—This statement was made up by you from data made by you and kept in the books of the Company, books under your charge, and kept by you?

"MR. DAVIS:—Yes, sir.

"MR. ROADS:—Now, take up the first item under date of July 26th, 1902. You give there the capacity at full time as 560 tons per day, at 16 cars, 35 tons each, as 14,560 tons. That covers the monthly capacity of the mine, does it not?

"MR. DAVIS:—Yes, 26 working days.

"MR. ROADS:—Now, the actual output you give as 8234 tons. Where did you get that data?

"MR. DAVIS:—From the coal mined and shipped.

"MR. ROADS:—What do you call that book you keep that record in?

"MR. DAVIS:—It was taken from the payrolls and number of tons mined.

"MR. ROADS:—Have you got those books with you?

"MR. DAVIS:—Yes, sir.

"EXAMINER BROWN:—Do you sell run-of-mine coal?

"MR. DAVIS:—That is run-of-mine.

"EXAMINER BROWN:—Some of it did go as slack?

"MR. DAVIS:—No, sir; all run-of-mine.

"EXAMINER BROWN:—When you got what your payrolls showed you had what was actually shipped?

"MR. DAVIS:—Yes, sir.

"MR. ROADS:—My idea is to show how this first line of the statement is made up, and then make a general statement in regard to all of them.

"EXAMINER BROWN:—That they were made in the same way?

"MR. ROADS:—Yes, sir. (Addressing the witness.) Now, explain to us how you got that actual amount of tonnage that was shipped. You have it under the head of actual output.

"MR. DAVIS:—The total number of tons mined and shipped that month. That was taken from the report of coal shipped daily.

"MR. ROADS:—The books show those entries you have given here?

"MR. DAVIS:—Yes, sir.

"MR. ROADS:—Now, then, the loss in tons, the next item. How do you arrive at those figures?

"MR. DAVIS:—That was the difference between the capacity at 16 cars of 35 tons capacity each, 560 tons per day, and the actual amount mined.

"MR. ROADS:—That represents, you say, the loss in tons, by taking the total capacity of the mines for the month and deducting ——

"EXAMINER BROWN:—You mean the rated capacity when you say total capacity?

"MR. ROADS:—Yes, the rated capacity. The difference between that represents this item of loss in tons, to wit, 6276 under the date of this item, July 26th, 1902. Now, you have fixed the average price of coal during the month of July, 1902, at $2.39. How do you make that up?

"MR. DAVIS:—That is taken from our shipping book.

"MR. ROADS:—Have you that in Court?

"MR. DAVIS:—Yes, sir.

"MR. ROADS:—Just refer to that shipping book, and tell us how you get at that $2.39 cost, give us the item?

"MR. DAVIS:—I took the various orders at various prices secured during the month, the month of July, as referred to in this data. One price was $2, another $2.10, another $2.15, another $2.25, another $2.35, another $2.50, another $2.60, another $2.65, and another $2.75. Totalling those and dividing by the number of prices given, I got an average price of $2.39.

"MR. ROADS:—And those prices are actual prices received from coal shipped, as appears from the book before you?

"MR. DAVIS:—Yes, sir.

"MR. ROADS:—Now, then, the next item is the average cost of production. You state that at 90 cents per ton. You reach that figure how?

"MR. DAVIS:—That was obtained by the total amount of the payroll for the month. The payroll, including mining and all labor and all expenses attached to the month's work to put this tonnage on the cars, and divide it by the tons mined and shipped.

"MR. ROADS:—That is from the actual cost.

"MR. DAVIS:—Yes, sir.

"MR. ROADS:—Have you a book there which that data was put in?

"MR. DAVIS:—Yes, sir.

"MR. ROADS:—What do you call that?

"MR. DAVIS:—That is called the payroll book. We keep the payrolls, and they are summed up at the end of the month. Say, two payrolls in a month.

"MR. ROADS:—Give us the figures from which that was made up?

"MR. DAVIS:—Payroll, first to 15th, $2721.61; payroll 16th to 31st, last half of July, $3791.16; royalty on coal $903.93; making a total expense for the month of $7416.70, divided by actual output, that is tons mined and shipped, 8284 tons, gives an average cost of 90 cents.

"MR. ROADS:—What would be the effect of a greater shipment of coal on the cost of production?

"MR. DAVIS:—On that same basis I figured that if we had shipped the capacity of the mine, the rated capacity of the mine being 14,560 tons, our cost would have been at the rate of 83 cents.

"EXAMINER BROWN:—Computed in the same way?

"MR. DAVIS:—Yes, sir.

"MR. ROADS:—Averaging it all the way through, say as near as you can tell, what is the cost of producing a ton of coal at Webster No. 4, since July, 1902, on say—suppose we make it on 8284 tons per month?

"EXAMINER BROWN:—That would be a matter of computation.

"MR. ROADS:—I think I have it exactly here, at 90 cents, that is about 80 or 90 cents, somewhere in there, generally speaking, and it varies, of course, with the shipments, the greater the shipment the less the cost of production per ton.

"MR. DAVIS:—Taking the 66 cent rate for mining, which was in effect from about April, 1903, to June, 1907, if we had worked the mines to about full capacity, we could have put the coal on the cars for about 81 cents.

"MR. ROADS:—That includes royalty does it?

"MR. DAVIS:—Yes, sir.

"MR. ROADS:—And any estimate for timber?

"MR. DAVIS:—Yes, sir.

"MR. ROADS:—What did you estimate for timber and royalty?

"MR. DAVIS:—Royalty was 10 cents, and about five cents a ton for timber, etc." (Record, pages 186-189.)

James H. Minds also testified that though rated at 560 tons, the mine had a capacity and facilities for shipping from 1000 to 1200 tons per day.

"MR. ROADS:—Didn't you have sufficient openings there to put miners at work so as to mine the coal?

"MR. MINDS:—Let me draw your attention to what you said, you said the capacity of the mines. The ca-

pacity of the mines ranges anywhere from 1000 to 1200 tons. I did not ship up to that.

"MR. ROADS:—I did not ask you about shipments. What I wanted to know was whether you did not have openings sufficient to put miners to work there to mine the full capacity of your tipples?

"MR. MINDS:—I certainly had.

"MR. ROADS:—What was the output capacity of your mine, say, in 1902?

"MR. MINDS:—Do you mean what we put out at that time?

"MR. ROADS:—No, I asked what was your output capacity?

"MR. MINDS:—The facilities for output?

"MR. ROADS:—Yes.

"MR. MINDS:—Anywhere from 1000 to 1200 tons.

"MR. ROADS:—That is per day?

"MR. MINDS:—Per day; yes, sir.

"EXAMINER BROWN:—Could you have loaded that much?

"MR. MINDS:—Yes, sir.

"EXAMINER BROWN:—You had that capacity on your tipples?

"MR. MINDS:—Yes, sir. You see, in the first place, the capacity of the mine is based on three things. The first is the territory, the coal, the second is rolling stock and the third is your tipple. I started in with all that, made all those preparations in the beginning when I started to open the colliery, and I maintained them up to the present day." (Record, page 180.)

This testimony plainly indicates that the defendants in error could have easily shipped the full rated capacity of their mines daily. These facts were all before the jury, and the credibility of each and every witness was absolutely for the jury, and we submit that the contention raised by the plaintiff in error in the second question involved, ignores the fact that the plain preponderance of testimony was with

the Coal Company and strongly supported the award and findings of the Commission.

The Circuit Court of Appeals, in passing upon this specification of error said (Transcript of Record, page 348):—

> "The Railroad complains, but we think without sufficient warrant, that the trial Judge erred in what he said to the jury in submitting the question, how much cost of mining would have been if the plaintiffs had received their proper share of cars. We think the instructions were sufficient and see no occasion to discuss them. Moreover, on this subject the evidence was conflicting, and, since the credibility of opposing testimony was involved, the Railroad was not entitled to binding instructions. The verdict on this point must be accepted as final."

3. UNDER ADEQUATE INSTRUCTIONS THE AWARD OF THE INTERSTATE COMMERCE COMMISSION AND ALL OTHER EVIDENCE AS TO COST OF PRODUCTION AND DISTRIBUTION OF CARS, WERE PROPERLY SUBMITTED TO THE JURY.

Regarding the third contention that the Commission in awarding damages in the second period of the action disregarded its own rule of distribution, we would say that this contention is rather an argument attacking the credibility of the award of the Commission as a matter of evidence, than as a matter of law for the Court. The same question arose in the trial covering the first period. It was just as essential to find the correct tonnage in the first as it was in the second period. We must conclude, for the defendant admits, that in the first period the Commission did not disregard its own rule. To sustain this statement and for the convenience of the Court we quote the following:—

> "MR. BIKLE:—In the first period we do not dispute the lost tonnage, only the cost. In the second period we dispute the correctness both of plaintiff's cost figures and also the tonnage. We ask that the Court so charge.

> "THE COURT:—Now, gentlemen, I want to make that clear. In the first period there is no question of the tonnage raised. The defendant concedes the amount of the tonnage, and the difference is all over the cost. So you need not trouble yourselves there with any other question than the cost question." (Record, page 303.)

It is inconceivable that a commission of eminent men with an efficient corps of accountants could have ascertained, by the application of its own rule of distribution, a tonnage indisputably correct in the first period of an action before it for adjudication, and then immediately err by applying another and different rule to the second period of the same action simultaneously under consideration with the first. Especially so is this the case when the Commission merely divided the one action into two periods, after the same had been brought, because of the death of one of the co-partners, handing down one opinion covering both periods and two supplemental opinions, awarding reparation at the one time. So closely related were these periods in their consideration and adjudication by the Commission that they bore consecutive docket numbers. The jury would be justified in inferentially finding that as the Commission's method in ascertaining the lost tonnage in the first period was admittedly correct, the second period, dealing with precisely the same commodity, shipped from the same mine, over the same railroad under like conditions, was likewise undoubtedly correct. That the Commission disregarded its own rule of distribution in the second period of the action, was argued before the jury. The jury in its deliberations upon this branch of the case was entitled to have the rule of distribution, prescribed or promulgated by the Interstate Commerce Commission, presented in evidential form for its consideration. The burden of doing this was upon the plaintiff in error and the query is, did the plaintiff in error assume the onus and offer in evidence the rule allegedly violated. In the Statement of the Case

(Plaintiff in Error's Brief, page 36), the rule of distribution of the Interstate Commerce Commission is stated and reiterated, although no page of the Record containing the same is quoted showing its offer and admission as evidence before the jury in the trial of the case. The statement of this rule in Plaintiff in Error's Brief and History of the Case will not avail the plaintiff in error if it were not before the Court and jury upon the trial of the cause. We submit that in the report and order of the Commission (Record, pages 235-283), while the question of the proper method of distribution is ably discussed and relevant opinions of appellate Courts quoted, no such rule as is set out in defendant's statement of the case or argument is promulgated as the Commission's rule of distribution, unless the discussion of what the proper rule should be can be construed as being the rule so explicitly stated by the plaintiff in error. It was not introduced as an exhibit, but the Court properly submitted the question to the jury under adequate instructions as to the effect of the award and all other evidence introduced in the cause. That the jury did not accept the award of the Commission in its entirety, plainly indicates that it gave due consideration to the testimony of Mr. H. H. Twose regarding the controversy arising upon the amount of lost tonnage, and also to the testimony of Mr. Hatfield upon the amount of the normal cost of production. If the testimony of these gentlemen and the contention of the plaintiff in error were disregarded, how is it possible to account for the fact that the jury rendered a verdict in the last period of only $22,958.10, instead of $31,715.57, the award of the Commission, being a difference of $8,758.47? This reduction may not seem at all substantial or sufficient to plaintiff in error, but to the elderly defendants in error, harassed by ten years of continuous litigation in seeking redress for discrimination, it comes with great force, and as a plain indication that the jury gave ample consideration to the testimony of Messrs. Twose and Hatfield.

The blueprint (Defendant's Exhibit No. 1) being a tabulation of the Railway Company's distribution sheets now

criticised by plaintiff in error was compiled at the direction of the Examiner of the Interstate Commerce Commission (Transcript of Record, pages 223, 4, 5) submitted to counsel for the Railroad Company and offered in evidence before the Interstate Commerce Commission without objection (Transcript of Record, page 112).

The plaintiff in error, in its eleventh assignment of error, complains that the Court should have affirmed the eighth point in the second period of the action as submitted. Bearing in mind the failure of the plaintiff in error to identify the rule of the Interstate Commerce Commission as quoted in its brief, with anything purporting to be the said rule, we submit that the Court had not sufficient evidence upon said rule upon which it could be justified in affirming said point, and without proper evidence of the rule itself, the point would be meaningless. Admitting, for argument, that the plaintiff in error had properly introduced in evidence the rule of the Commission, or showed the Commission's certification of a proper rule, the Court in its charge to the jury adequately protects the rights of the plaintiff in error in this regard, as will fully appear by reference to the charge of the Court in the following particulars:—

> "I think I have gone over the subject matter of all the different points submitted to me. So far as they are affirmed in the general charge, they are affirmed; and so far as not affirmed in the general charge, they are disaffirmed, and counsel if they choose may call my attention to any specific point which they would like to have specifically answered. * * *
>
> "MR. BIKLE:—In the first period we do not dispute the lost tonnage, only the cost. In the second period we dispute the correctness both of plaintiffs' cost figures and also the tonnage. We ask that the Court so charge.
>
> "THE CHARGE:—Now, gentlemen, I want to make that clear. In the first period there is no question of the tonnage raised. The defendant concedes the

amount of the tonnage, and the difference is all over the cost. So you need not trouble yourselves there with any other question than the cost question. In the second period the claim is questioned in two respects, the cost, as it is in the first period, and the tonnage is also questioned. So of course you cannot determine the amount of damage until you have settled both of those questions.

"I understand that the parties have agreed that their respective statements of their positions may be sent out in order to save the jury the labor of making calculations. Is that correct?

"MR. GLEASON:—Yes, sir.

"MR. BIKLE:—Yes, sir.

"THE COURT:—So, gentlemen, you will have the benefit of the figuring of the parties on each side, which will present these respective views. You will take the case and dispose of it. * * *

"Counsel for the defendant except to the refusal of the learned trial Judge to charge as requested by them in such points as were not affirmed.

"(Exception noted for defendant by direction of the Court.)" (Record, pages 302, 303, 304.)

The Court in an opinion *sur* rule in arrest of judgment and for a new trial, treating especially this omission to charge, said:—

"* * * This complaint has a real basis. We would not, however, feel justified in subjecting the parties to the delay and expense of a new trial because of the inadequacy of the charge in this feature. The reason is this: the testimony referred to was that of an intelligent and fair witness with a firm grasp of the facts to which he testified. *These were all book-keeping or mathematical facts as he had no knowledge except that derived from the figures submitted to him.*

Italics ours.

> The trial Judge had in mind the definite purpose to advert to this testimony and its application to the case, but he was diverted from this purpose and it was forgotten. Counsel for defendant were in no way responsible for this lapse and their client should not suffer for it. *Nevertheless the fact is they did not call attention to the oversight.* Neither was it the fault of the plaintiffs and they are in no default and the loss should not fall on them." (Record, pages 326, 327.)

Further in the supplemental opinion the learned Judge said:—

> "With respect to the inadequacy of charge feature, all that is intended is that the failure of the trial Judge to specifically call the attention of the jury to the testimony of the witness referred to was, as it has been stated to have been, an oversight. *Had the attention of the trial Judge been called to this, he would have supplied the omission.*" (Record, page 328.)

In this case we have a trial Judge, at the close of his charge, plainly inviting counsel, if they choose to call his attention to any *specific point* they would like to have *specifically answered*, to do so, and he would specifically answer the same. Mr. Bikle, of plaintiff in error's counsel, then asked the Court to charge that in the second period the plaintiff in error questions the correctness of defendant's cost figure, *and also the tonnage*. The Court so charged the jury, and in so doing referred to statements agreed upon by counsel for the plaintiff in error and the defendants in error, which contained the respective statements of their positions and which, it was agreed, were to be sent out with the jury, which was accordingly done. After the Court's general invitation so to do, Mr. Bikle did not call the Court's specific attention to the eighth point alleged as the eleventh assignment of error. What he did was to acquiesce in the agreement to send out with

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Italics ours.

the jury a statement embodying his position, which he had defined but a moment before to the Court. The plaintiff in error only produced one witness, H. H. Twose, whose testimony had sole relevancy to the question of lost tonnage involved in the second period, and of necessity statements of the plaintiff in error in this particular were based upon the tabulations of this witness in Exhibit 3 (Record, page 233). How else can the failure of the learned counsel for the plaintiff in error to avail himself of the opportunity presented by the Court, at the close of his charge, to call his attention to any specific point which they would like to have specifically answered, be explained? The trial Judge, who had evidently overlooked the deep significance of his invitation directed to counsel at the close of his charge, to call his attention to any specific point that they wanted specifically answered, and the statement submitted by agreement to the jury, states and reiterates in his opinion in arrest of judgment, refusing a new trial, and in his supplemental opinion, that had the matter been called to his attention he would have then and there explained the omission or oversight complained of. His attention not having been called thereto, in the light of the full opportunity presented, can advantage now be taken at this late date of the Court's failure to discuss the matter complained of as fully as the plaintiff in error wished? That the trial Judge was correct in his ruling is shown by the following cases:

> By SHARSWOOD, J.:
>
> "If there was a mistake committed as to their testimoney it was evidently an inadvertent one, and had his attention been called to it at the close of the charge, the learned Judge would have referred to his notes and either corrected the one or the other according to the fact. * * * We do not think that the jury were misled by anything in these portions of the charge here assigned for error, and these assignments are therefore dismissed." (Eckman *vs.* Eckman, 68 Pa. 460 (1871), page 469.)

> "The Court need not answer specifically or read to the jury points presented to it if they are substantially negatived in general charge and the jury told all points not answered are refused." (Hommel *vs.* Lewis, 104 Pa. 465 (1883).)

The plaintiff in error cites the case of Pennsylvania Railroad Company *vs.* Jacoby & Company, 242 U. S. 89 (1916) and contends that the testimony in that case was similar to the testimony existing in the present proceedings. Even in the most essential particulars, this statement is not correct.

In the Jacoby case, the Pennsylvania Railroad claimed that the Coal Company had received all the cars to which it was entitled under the Commission's rule of distribution, while the plaintiff in error in the case at bar admits in the very point of controversy in the second period that there was a shortage in the proper supply of cars furnished defendants in error, of 739 cars or 25,865 tons (Transcript of Record, page 315).

Again we find in the Jacoby case that the verdict rendered was in the exact amount of the award sued upon, while in the proceedings pending, the two awards were reduced by the two verdicts in the total sum of $16,358.84.

The plaintiffs in the Jacoby case relied absolutely upon the award, while in these cases the defendant in error was fortified by the testimony of material and corroborating witnesses whose testimony was read into the Record, and referred to the number of working days in the month, the normal cost of production and acts of discrimination, from which the jury might have found that the cost of production was as low as 83 cents a ton, and that the equipment at the mine could easily ship its full rated capacity (Transcript of Record, pages 180, 186 to 189).

In the Jacoby case, the point asking for conclusive instructions was presented, read and refused with other points, at the conclusion of the charge of the Court, while in the case at bar, the points, without reading, were affirmed or refused

in the manner in which reference was made to them in the final charge, and even after an expressed invitation by the Court, no specific request was made by the plaintiff in error for a formal answer to its eighth point, now submitted as its eleventh assignment of error (Transcript of Record, page 302).

In the Jacoby case, no tabulations by the plaintiffs and defendants were sent out with the jury. In the case at bar, such tabulations were, by agreement, sent out with the jury, and the tabulation of the plaintiff in error was a mathematical calculation based on their theory of the case as expressed in the testimony of their witness, Mr. Twose, and the points submitted to the Court (Transcript of Record, page 303).

In the Jacoby case, no admission was made that the tonnage found by the Commission was proper in any period, whereas in the case at bar, it is admitted that the tonnage found by the Commission in the first period is correct, and that, therefore, the correct rule must have been applied, while it is denied that the rule was properly applied in the second period.

We submit that the decision in the Jacoby case is based upon facts entirely different from the case now under consideration by this Court, the conflicting testimony as to these facts was properly sent to the jury for their decision and decided by it.

The Circuit Court of Appeals, in passing upon this specification of error, said (Transcript of Record, page 348):—

> "The next matter concerns the second period only, and presents the objection on which the Railroad seems to lay most weight, namely, that in making the orders for reparation the Commission followed, not its own, but another, rule of distribution. In this respect the Railroad contends that the situation is very much like the situation Railroad *vs.* Jacoby, 242 U. S. , and indeed is controlled by that decision. In our opinion an important difference exists for the following reasons: * * *

"In some respects the case now in hand is like Jacoby's case, but it differs in what we regard as a material particular. Laying aside the fact that the present plaintiffs offered other evidence than the Commission's findings and orders, we think it important to observe that the principal of each verdict is for a sum considerably less than the principal of the Commission's award, so that the recovery here does not rest on the award alone, but is undoubtedly based on all the evidence touching the subject of the plaintiff's damage. As an award by the Commission is only *prima facie* evidence of the amount of damage, it follows that on the trial in the District Court the Railroad may attack the amount, and if the evidence shows that the award is incorrect the jury should follow the evidence and reject the award. We do not decide the question, whether a plaintiff can recover more than the Commission awards, but undoubtedly the Railroad may prove that the sum is too large. As the verdicts here demonstrate, the jury did not follow the orders of the Commission, and it seems to us, therefore, that, even if the awards be calculated on the wrong theory, the plaintiffs have not recovered on this theory, but on other evidence, and are not to be charged with the Commission's possible mistake. In the Jacoby case the jury repeated the Commission's mistake precisely and in this respect the case before us appears to be materially different, for the jury here has rejected the Commission's calculation, and has reached a different result."

4. COMPENSATION FOR DELAY.

The plaintiff in error's own admission that the jury cut down the principal amount of the Commission's finding $16,358.84 seems to give it a degree of satisfaction that is conspicuously absent from the language used in discussing the prior proposition advanced by it. The amount of the award in the first period is not $18,591,48, but *$18,-*

591.48 with interest thereon at the rate of six per cent. per annum from June 28th, 1907, while in the second period, it is not $31,715.57, but *$31,715.57 with interest thereon at the rate of six per cent. per annum from June 28th, 1907, as the* orders for reparation plainly show. The decisions quoted by the plaintiff in error have the virtue of representing a certain line of cases that justify the application of the principle cited in its brief, but no case is cited therein where the interest itself is as much an integral part of the award as the principal itself. Section 8 of the Act to Regulate Commerce provides "such common carrier shall be liable to the person or persons injured thereby for the *full amount* of damages sustained in consequence of such violation of the provisions of the Act to Regulate Commerce." The trial Court upon this question very fairly charged the jury in the following language:

> "Now, if you find for the plaintiff you will include in your verdict such an amount as will compensate him for this difference. It has been some time since the damage was done. Had he received his money then when the damage was freshly done, all he would have been entitled to would have been his damage, but some time has elapsed, necessarily elapsed—and you are not to attach any blame to anybody for that; the problem submitted to the Interstate Commerce Commission was a very complex and difficult problem, and it took a long investigation to determine just what the facts really were; it was nobody's fault that they were not paid at once, because nobody could know then what the damages were, but that is not the fault of any one, and it is not the fault of the plaintiff, and therefore you are to put him back by your award now in the same position as if you had given him the amount of damages at the time at which he was entitled to them." (Record, pages 301-302.)

In the case of Puritan Coal Mining Company *vs.* Pennsylvania Railroad Co., 237 Pa. 434, which was affirmed in

the Supreme Court of the United States in 237 U. S. page 121, and in which was an ultimate recovery of $51,257.85, the Court, in a very pertinent opinion applicable to these cases, in allowing forty-five per cent. additional for delay of seven and one-half years, said:—

> "Applying these principles to the case in hand, was the Court justified, acting as he was as the jury in this case, in assessing forty-five per cent. as compensation for the delay? The law, the facts and the justice of this case, as we believe, justify the allowance. To determine this a brief review of the case and the claim is necessary. The original praecipe, filed March 26th, 1908, claimed for damages not exceeding $75,000. Plaintiff's statement, filed November 21st, 1908, claimed the right to recover $49,936.07, with an additional amount to compensate for delay. About the same time plaintiff brought suit in the Circuit Court of the United States, against the same defendant, claiming the right to recover $242,999.65, for the same alleged discrimination based on identically the same facts, claiming, however, to recover in that Court because of the jurisdiction of said Court over interstate commerce. On April 3d, 1911, plaintiff in this case was allowed to amend its praecipe by substituting a statement for damages to the amount of $300,000, instead of $75,000, and a declaration was filed in this Court claiming the right to recover $260,777.96, on exactly the same alleged discriminatory acts as in the original statement" (page 434).

The Circuit Court of Appeals, in passing upon this specification of error, said (Transcript of Record, page 351):—

> "Besides, if the subject should be within our power on this record, the amount of this allowance, whether by the Commission or by the jury, does not seem to us excessive, and we see no reason on this account to interfere with the verdict."

5. AWARD OF COUNSEL FEES.

Opposition is made by the plaintiff in error to the allowance of counsel fees aggregating $10,000 in the two cases, in which the aggregate amount of the judgments entered was $49,711.29. It is submitted that the opinion of the learned trial Judge closely follows the principles announced in the allowance of counsel fees in the case of Meeker *vs.* L. V. R. R. Co., 236 U. S. 412 (1915). The trial Judge not only professed to exclude an allowance for services rendered in proceedings before those taken in Court, but he actually did exclude allowances for any work done before the Commission in the following language:—

> "It has been ruled that the Act provides only for counsel fees in the proceeding at law, and that no allowance can be made for services rendered before the Interstate Commerce Commission. We have, therefore, restricted the allowance by excluding all proceedings before those begun in this Court. (Record, page 330.)
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> * * * * * * *
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> "It is not that they should be allowed now for these past services because this should not be done and is not done." (Record, page 331.)

For the plaintiff in error to represent that the trial Judge was without the requisite knowledge to enable him to determine what the amount of the fee should be, and to insinuate in the same paragraph that he had no evidence of the time and labor involved in the preparation of the cases, is unfair and misleading, for the reason that the motion for the allowance of attorney fees in both cases was made immediately after the jury had retired and in the presence of counsel for the plaintiff in error. The amount of time and labor involved in the preparation of the cases was discussed before the Court, and participated in by counsel on both sides. The counsel fee allowed in both cases is an extremely reasonable fee for the amount of time and labor

involved in the preparation and trial of these cases. It must be borne in mind that the petitions in the cases at bar were filed February 7th, 1913, and the proceedings have continued over a long period of time. The discussion by the learned trial Judge of the subject matter involved is full and complete, and justifies his discretion in fixing fees in these cases which it is submitted are fair and reasonable.

The Circuit Court of Appeals, in passing upon this specification of error, said (Transcript of Record, page 351):—

> "As to the award of counsel fees, we are similarly uncertain. We accept the statement of the trial Judge that he confined himself to compensation for services in the District Court, and as we do not know what facts he had before him, we are unable to say that any abuse of discretion appears from the mere amount of his award."

All of which is respectfully submitted.

GEORGE M. ROADS,
H. W. MOORE,
JOHN H. MINDS,
JAMES A. GLEASON,
Attorneys for Defendants in Error

PENNSYLVANIA RAILROAD COMPANY *v.* MINDS, SURVIVING AND LIQUIDATING PARTNER OF MINDS ET AL., LATELY TRADING AS BULAH COAL COMPANY.

PENNSYLVANIA RAILROAD COMPANY *v.* MINDS ET AL., TRADING AS BULAH COAL COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Nos. 293, 294. Argued April 23, 1919.—Decided June 9, 1919.

In actions upon two closely related reparation orders, *held* that a mistake in the declarations transposing the awards, first discovered by the District Court near the close of the trial, was subject to correction by amendment in that court's discretion. P. 370.

Where a railroad company, guilty of unlawful discrimination in car distribution, for years contested the claims of the injured shippers,

and offered no payment of awards for damages and interest made by the Interstate Commerce Commission, it is not erroneous in actions upon the awards to permit the jury to allow interest in its verdicts, even though the shippers' claims were excessive. P. 370.

In actions on reparation orders, *held* that the District Court did not abuse its discretion in fixing counsel fees, or commit error in its charge as to the cost of producing coal, as an element in the damages. P. 371.

In such an action, where there was expert evidence tending to prove (as in *Pennsylvania R. R. Co.* v. *Jacoby & Co.*, 242 U. S. 89), that the Commission's award was based upon tables of car distribution which if followed in practice would have given the complaining shippers the illegal preference of which they complained, *held* that the railroad was entitled to an instruction that the award should be disregarded if the Commission followed such tables; and that refusal of its request for such instruction would be substantial error notwithstanding there was other evidence as to the damages and the verdict was much less than the award. *Id.*

Where it is obvious from remarks of the trial judge at the close of his charge that he has inadvertently overlooked one of several requests to charge and opportunity is expressly given to suggest the omission, failure to avail of the opportunity waives the error in not granting the request; a general exception to refusals to charge as requested will not suffice. P. 373.

244 Fed. Rep. 53, affirmed.

THE cases are stated in the opinion.

Mr. Francis I. Gowen and *Mr. Frederic D. McKenney*, with whom *Mr. Henry Wolf Biklé* was on the brief, for plaintiff in error.

Mr. James A. Gleason, with whom *Mr. George M. Roads*, *Mr. H. W. Moore* and *Mr. John H. Minds* were on the brief, for defendants in error.

MR. JUSTICE DAY delivered the opinion of the court.

These cases were tried together in the courts below and may be considered and disposed of in like manner here.

They were brought upon reparation orders made by the Interstate Commerce Commission based upon alleged discrimination against the plaintiffs in car distribution. Two periods were in controversy. In No. 293 from July 1, 1902, to October 1, 1904; in No. 294 from October 1, 1904, to June 30, 1907. Verdicts and judgments were recovered in both cases against the Company. The judgments were affirmed in the Circuit Court of Appeals. 244 Fed. Rep. 53.

During the first period James H. Minds and William J. Matz, trading as Bulah Coal Company, operated the mine alleged to have been subjected to unlawful discrimination. During the second period a partnership, composed of Minds and the widow of Matz, trading under the same name, operated the mine. Two proceedings for reparation were brought before the Interstate Commerce Commission. In the first an order of reparation in the sum of $18,591.48 was awarded, with interest thereon at the rate of 6% per annum from June 28, 1907. For the second period an award was made in the sum of $31,715.57 with 6% interest from the same date. The verdicts of the jury were, for the first period, $16,092.92, for the second period $33,618.37.

(1) The plaintiff in error complains of the allowance of an amendment correcting a mistake in the declarations transposing the awards. The mistake was first noticed by the court near the close of the trial. This amendment was so obviously just and within the court's discretion that we need only say that we think no error was committed in allowing it.

(2) It is insisted that the court erred in allowing the jury to add interest not exceeding 6% on the damages found; this upon the theory that the recoveries were below the amounts claimed before the Commission which were so large as to be wholly unfair. But the defendants in error were entitled to full compensation for the damages

sustained as the result of the wrongful discrimination against them. (§ 8 of the Act to Regulate Commerce.) The Commission allowed interest as part of its award, and the District Court charged the jury that it might do so in making up its verdicts. We see no error in this. For years these claims have been contested, the Company never offered any payment of the awards, and unless interest is to be allowed there seems to be no means of making the claimants whole for the wrongs sustained by violations of the statute.

(3) It is contended that the court erred in fixing counsel fees, as only those are allowable which compensate for court services. *Meeker* v. *Lehigh Valley R. R. Co.*, 236 U. S. 412. But we are not prepared to say that the court abused its discretion in fixing the fees. There is nothing to warrant our interference with the judgments in this respect.

(4) Error is alleged in the charge as to the cost of producing the coal which entered into the computation of damages. Upon this point there was a conflict in the testimony, and an examination of the charge satisfies us that the question was fully and fairly left to the jury.

(5) We come to the final and most serious complaint of error in the proceedings. As to the first period there was no contest over the amount of tonnage which the plaintiffs could have shipped had the cars been fairly distributed during that period. As to the second period, the contention is that there was testimony tending to show that the Commission awarded reparation under a rule which violated its own final determination of the correct rule, in the same manner as was shown in *Pennsylvania R. R. Co.* v. *Jacoby & Co.*, 242 U. S. 89, resulting in the reversal of the judgment in that case. There is no showing that the court gave a wrong rule in this respect in its charge to the jury. But here as in the *Jacoby Case*, the Company called an expert witness who testified that the

tables in a blue-print, put in evidence by the complainants before the Commission, were made upon a basis of car distribution, which, if applied to complainants, would result, as pointed out in the *Jacoby Case*, in giving to them the wrongful preference which had been awarded to favored companies. The witness testified that a computation showed that the Commission, in making its award, had followed this erroneous table and had used its percentages as the basis of its award. The record discloses that the Company asked eighteen special points to be given in charge to the jury; in two of which it requested charges which were based on this witness' testimony as to the inaccuracy of the tables, asking the court in substance to say to the jury that, if the Commission used such tables in making its computation, the awards were on a wrong basis and should be disregarded.

The Circuit Court of Appeals answered this contention by distinguishing the *Jacoby Case*—in that the recovery in that case was based wholly upon the award of the Commission and in precisely the same amount, whereas, in this case there was other testimony as to the damages, and the jury awarded a recovery in a sum much less than the amount fixed by the Commission. If these were all the grounds of distinction between this and the *Jacoby Case* we should be constrained to hold that the failure to give the Company's special requests, based on the expert's testimony, was substantial error, requiring a reversal, but at the close of his charge the judge said:

"I think I have gone over the subject matter of all the different points submitted to me. So far as they are affirmed in the general charge, they are affirmed; and so far as not affirmed in the general charge, they are disaffirmed, and counsel if they choose may call my attention to any specific point which they would like to have specifically answered."

The court in its charge had not adverted to the effect

to be given to the testimony of the defendant's expert. The observations, just referred to, called upon counsel to direct the court's attention to points omitted. The plaintiffs' counsel called the court's attention to some things. Counsel for the Company said:

"In the first period we do not dispute the lost tonnage, only the cost. In the second period we dispute the correctness both of plaintiffs' cost figures and also the tonnage. We ask that the court so charge."

The Court responded: "Now, gentlemen, I want to make that clear. In the first period there is no question of the tonnage raised. The defendant concedes the amount of the tonnage, and the difference is all over the cost. So you need not trouble yourselves there with any other question than the cost question. In the second period the claim is questioned in two respects, the cost, just as it is in the first period, and the tonnage is also questioned. So of course you cannot determine the amount of damage until you have settled both of those questions.

"I understand that the parties have agreed that their respective statements of their positions may be sent out in order to save the jury the labor of making calculations? Is that correct?"

Counsel for the plaintiffs and for the Company each answered, "Yes, sir."

The Court: "So, gentlemen, you will have the benefit of the figuring of the parties on each side, which will present their respective views. You will take the case and dispose of it. . . .

"Counsel for the defendant excepted to the refusal of the learned trial judge to charge as requested by them in such points as were not affirmed. (Exception noted for defendant by direction of the court.)"

We have then this situation: After a charge, dealing with the general questions in the case, with numerous

special requests to charge "points," as they are called, the presiding judge expressed the view that he thought he had gone over the subjects embraced in the requests submitted. That he had omitted some is not surprising, for the court was dealing with an exceedingly difficult and complicated situation of car distribution, concerning which the Interstate Commerce Commission, the body primarily entrusted with the determination of such matters, had long deliberated before announcing the rule upon which it finally acted and made its award in the series of cases of which those now before us are a part. Upon the invitation of the trial judge the Company's counsel made the request which we have quoted, and the judge at once complied with it, and charged, as counsel desired, upon that particular subject, adding that he understood that the parties had agreed that the respective statements of their positions might go to the jury to save it the labor of making calculations. In this way the parties got before the jury the calculations showing their respective claims. This may have been and probably was the reason for the failure of counsel to call attention to the omission to answer the particular points requested concerning the effect to be given to the testimony of the defendant's witness, if credited by the jury. Apparently counsel were satisfied when the jury had before it the table showing the basis of their claims in the case. But, whatever the reason, the court after a careful and painstaking charge, thinking he had answered the "points" of both sides, called upon counsel to suggest omissions as to particular points; then followed the proceedings already recited. We think counsel should have directed attention to the omission which it is evident was inadvertent. The case, in this aspect, is entirely unlike the *Jacoby Case*, where a specific request was made and refused, and a recovery had upon an award of the Commission which the testimony tended to show was made upon a wrong basis.

This court has repeatedly held that objections to the charge of a trial judge must be specifically made in order that he may be given an opportunity to correct errors and omissions himself before the same are made the basis of error proceedings; this is the only course fair to the court and the parties. *McDermott* v. *Severe*, 202 U. S. 600, 610; *Norfolk & Western Ry. Co.* v. *Earnest*, 229 U. S. 114, 120; *United States* v. *U. S. Fidelity Co.*, 236 U. S. 512, 529; *Jacobs* v. *Southern Ry. Co.*, 241 U. S. 229, 236; *Guerini Stone Co.* v. *Carlin Construction Co.*, 248 U. S. 334, 338. Parties may not rest content with the procedure of a trial, saving general exceptions to be made the basis of error proceedings, when they might have had all they were entitled to by the action of the trial court had its attention been seasonably called to the matter.

The trial court and the Court of Appeals have refused to disturb the amounts awarded by the jury as compensation for the clear violation of the Interstate Commerce Act, which these records disclose, and which were very much less than the sums awarded by the Commission when the allowance of interest is considered which under the court's instructions entered into the verdicts. We think the only serious ground upon which reversal may be asked is found in the failure to give the points, to which we have referred, and as to them, we are of the opinion that such failure was waived by the course of proceeding to which attention has been directed.

Affirmed.